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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 597

THE WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

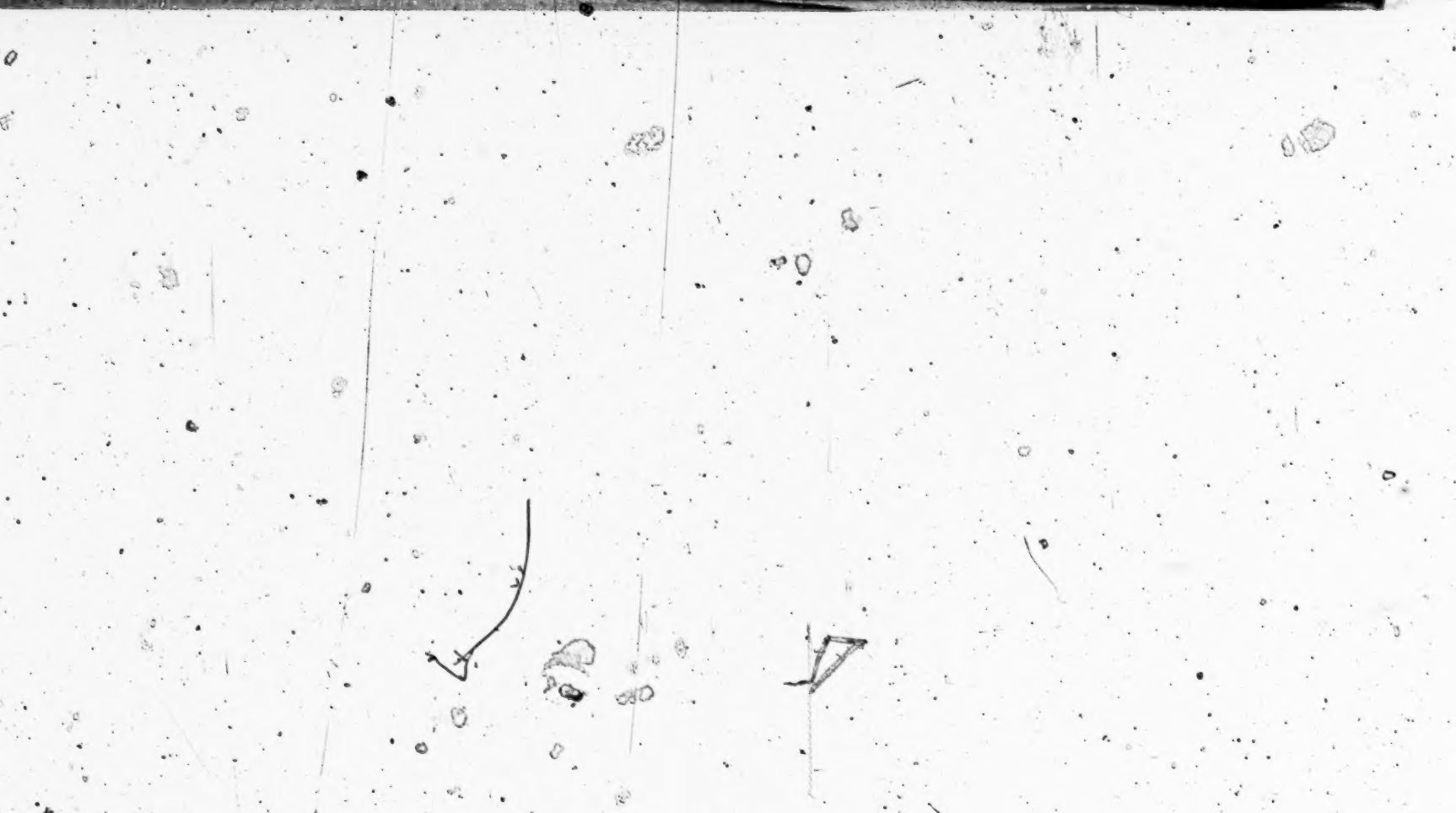
vs.

PAUL NESTER AND JUAN CHARLES,
CO-PARTNERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 18, 1939.

CERTIORARI GRANTED JANUARY 29, 1940.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

PAUL NESTER AND JUAN CHARLES, CO-PARTNERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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For Appellees:

AUGUST J. O'CONNOR, Esq.,
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*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

No. 8447-Y

PAUL NESTER and JUAN CHARLES, co-partners,

Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY, a corporation, DOE CORPORATION, DOE TWO CORPORATION, T. J. INIE, JOHN DOE ONE and JOHN DOE TWO,

Defendants.

COMPLAINT FOR DAMAGES FOR BREACH OF DUTY

The plaintiffs complain of the defendants and each of them, and for cause of action allege:

I.

That at all times herein mentioned the plaintiffs were and still are co-partners; and on or about Sept. 1st, 1937 were engaged in operating the mine "El Porvenir" under lease in the Republic of Honduras, near the village of Aramecina.

II.

That at all times herein mentioned plaintiffs were and are residents and citizens of the Southern District of California, Central Division of the State of California.

III.

That at all times herein mentioned, the defendant Western Union Telegraph Company was and is a corporation duly organized and existing under and by virtue of the laws of the State of New York authorized to do and doing business in the State of California; that the said defendant was and is a resident and citizen of the State of New York. [2]

IV.

That at all times herein mentioned, the defendant Doe Corporation was and is a corporation duly organized under and by virtue of the laws of a state of the United States, authorized to do business in the State of California.

V.

That at all times herein mentioned the defendant Doe Two Corporation was and is a corporation duly organized under and by virtue of the laws of a foreign country, authorized to do business in the State of California.

VI.

That the defendants Doe One Corporation, Doe Two Corporation, John Doe One and John Doe Two are sued herein by their fictitious names for the reason that their other and true names are unknown to the plaintiffs; that when said other and true names are ascertained, plaintiffs will ask leave of Court to amend, inserting said other and true names in the place and stead of said fictitious names.

VII.

That at all times herein mentioned the defendant T. J. Inie was and is a duly appointed employee, agent, servant and/or representative of the Western Union Telegraph Company, and acting within the scope of her authority as such.

VIII.

That the amount in controversy herein exclusive of costs and interest is over three thousand ($3,000) dollars.

IX.

That at all times herein mentioned the defendant Western Union Telegraph Company together with its connecting lines was engaged in the business of transmitting money and messages by telegraph and cable for hire between the City of Los Angeles, State of California, and the village of Aramecina, Republic of Honduras; that on or [3] about the 1st day of September, 1937, in the said City of Los Angeles, the plaintiff, Paul Nester, paid to the defendant Western Union Telegraph Company through its agent T. J. Inie, the sum of one hundred and fifty ($150) dollars to be transmitted to the plaintiff Juan C. Charles, at said Aramecina, Republic of Honduras; that the said defendant demanded and received of said Paul Nester the sum of seven dollars and forty-four cents for the transmission of the said sum; that the defendant gave the said plaintiff Paul Nester a receipt therefor, showing the payee and destination to be as above

indicated and told plaintiff he would be notified within three days if payment had not been made.

X.

That on or about the 14th day of September, 1937, the defendant Western Union Telegraph Company notified the plaintiff Paul Nester, by letter that an overcharge of one dollar had been made in connection with plaintiff's cable money order to Aramecina "British" Honduras, and refunded said sum forthwith; that the plaintiff Paul Nester, immediately communicated with said defendant and called to its attention the word "British", whereupon plaintiff was assured that the word "British" Honduras was a mistake on the part of its stenographer, and records and files were exhibited to said plaintiff showing the word "Honduras" indicated that the cable money order had been correctly directed to Juan C. Charles "Amarcenia" Honduras.

XI.

That on or about the 25th day of September, 1937, plaintiff Paul Nester, received a letter from plaintiff Juan C. Charles, stating that said sum of one hundred and fifty dollars which the defendant undertook to transmit had not been received; that the same day the plaintiff, Paul Nester, presented himself at the main office of the defendant Western Union Telegraph Company and informed said defendant accordingly and inquired why he was not [4] notified of non-delivery; that the defendant ad-

mitted a lack of knowledge but would investigate and report back to said plaintiff.

XII.

That on or about the 28th day of September, 1937, the defendant notified the plaintiff Paul Nester, that due to an unfortunate irregularity in its service the said cable money order was transmitted to "British" Honduras, and that the remittance had been redirected to the said designated foreign destination "Aramcenia" Honduras; that on or about the 13th day of October, 1937, the defendant further telegraphed the plaintiff, Paul Nester, that said cable money order had been paid and that payee took delivery of funds on said last mentioned date.

XIII.

That the said defendants carelessly and negligently delayed, failed and neglected to deliver said money to the aforesaid foreign destination and the said money has not been delivered to or received by the plaintiff, Juan C. Charles, whereas the same in the ordinary course of prompt transmission and delivery should have been delivered to the plaintiff Juan C. Charles on the 3rd day of September, 1937.

XIV.

That by reason of the gross negligence, carelessness and failure of said defendants and each of them aforementioned to deliver the said money, and as a proximate consequence thereof, the plaintiff

Juan C. Charles was unable to pay on the due date the freight, custom house, brokerage and consular fees on fifty cases of gasoline, four cases of oil, one ore car, one radio, and two sacks of blacksmith fuel coal, all of which had arrived and which had been shipped by the said plaintiff Paul Nester; that had the defendants made delivery of the said money according to their undertaking, the plaintiff Juan C. Charles would have had ample funds and could and would have paid the said fees and charges on said [5] due date; that the plaintiff Juan C. Charles was unable to procure other credit or money elsewhere to pay said charges and fees, and as a proximate consequence of the plaintiff's inability to do so on the aforesaid due date proximately caused by the negligence of the defendants and each of them, all of the hereinabove mentioned property belonging to the plaintiffs, which was reasonably worth five hundred dollars, was confiscated by governmental agencies of said Republic of Honduras and was completely lost to the plaintiffs; that since plaintiffs' lease on El Porvenir mine was conditioned on the payment of said fees and charges, the said lease which was to expire on the 15th day of November, 1937, was likewise confiscated and completely lost to the plaintiffs; that the value of such unexpired portion of said lease was reasonably worth six thousand dollars; that the aforesaid gasoline, oil and fuel which was confiscated was ample and sufficient to run the said El Porvenir Mine for the unexpired portion of said lease, and the labor and work

necessary for running the same was an obligation for which the plaintiffs had bound themselves to pay and did pay the sum of eleven hundred dollars notwithstanding the confiscation of said lease as aforementioned; that by reason of the negligence and carelessness of the defendants and each of them as aforesaid, and as a proximate consequence thereof, the plaintiffs have been damaged in the sum of seventy-six hundred dollars ($7,600.00).

Wherefore, plaintiffs pray damages in the sum of seventy-six hundred ($7,600.00) dollars, and for their costs herein, and for such other and further relief as the Court may deem just and proper in the premises.

A. J. O'CONNOR

Attorney for Plaintiffs

July 26, 1938. [6]

States of California,
County of Los Angeles—ss.

Paul Nester being by me first duly sworn, deposes and says; that he is one plaintiff in the foregoing and above entitled action; that he has read the foregoing complaint for damages for breach of duty and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

PAUL NESTER.

Subscribed and sworn to before me this 26th day of July, 1938.

[Notarial Seal] FERN E. WORMAN,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed July 26, 1938. [7]

[Title of District Court and Cause.]

ANSWER

Come now the defendants, The Western Union Telegraph Company, a Corporation, and Thelma Ivie, sued and served herein as T. J. Inie, and answering the Complaint herein for themselves alone, admit, deny and allege:

I.

Answering Paragraphs I, II, IV, V and VI of said Complaint, those defendants do not have sufficient knowledge, information or belief to enable them to answer said paragraphs, and basing their answer on that ground deny generally and specifically each and every allegation in said paragraphs contained.

II.

Answering Paragraph IX these answering defendants admit each and every allegation therein contained, except that they deny that any money was to be transmitted to Juan C. Charles, or any other person, at Aramecina, in the Republic of

Honduras, or that plaintiff, Paul Nester, received any receipt for any money showing [8] the payee and destination to be Juan C. Charles, or any other person, at Aramecina, Republic of Honduras, but allege the fact to be that the said plaintiff, Paul Nester, paid in One Hundred fifty and No/100 ($150.00) Dollars and requested the same to be transmitted to Juan C. Charles at Aramecina, British Honduras, and these defendants deny that said plaintiff was told that he would be notified within three (3) days, or at all, if payment had not been made.

III.

Answering Paragraph X, these defendants deny that at any time plaintiff, Paul Nester, or any other person, was assured that the word "British" Honduras was a mistake on the part of its stenographer, or at all, and deny that said word was a mistake on the part of these defendants; on the contrary these defendants allege that the plaintiff, Paul Nester, himself, gave the address of destination as Aramecina, British Honduras, and these defendants deny that the records and files of defendant, The Western Union Telegraph Company, showed any other destination than Aramecina, British Honduras, or that the cable money order had been directed in any other way than to Juan C. Charles, Aramecina, British Honduras.

IV.

Answering Paragraph XI, these defendants have no knowledge, information or belief sufficient to enable them to answer the allegation that the plaintiff, Paul Nester, received any letters from Juan C. Charles, as alleged in said paragraph and basing this answer on such ground, deny that the said plaintiff, Paul Nester, received any letter from said plaintiff, Juan C. Charles.

V.

Answering Paragraph XII of said complaint, these answering defendants, admit that on or about the 13th day of October, 1937, the defendant, The Western Union Telegraph Company, [9] telegraphed to plaintiff, Paul Nester, that said cable money order had been paid and that payee took delivery of said funds on said date, but in this connection these answering defendants allege that such information was furnished to said defendant, the Western Union Telegraph Company, by its connecting carrier. These defendants deny each and every other allegation in said paragraph contained.

VI.

Answering Paragraph XIII, these answering defendants deny each and every allegation in said paragraph contained, and in this connection allege that thereafter said money was returned to plaintiff, Paul Nester, through banking channels and draft

for refund thereof with charges thereon issued to, accepted and retained by said plaintiff, Paul Nester.

VII.

Answering Paragraph XIV of said complaint, these defendants do not have sufficient knowledge, information or belief to enable them to answer the allegations therein contained, and basing their answer on that ground deny each and every allegation therein contained, except these defendants deny positively and specifically that these defendants, or either of them, were guilty of any negligence or carelessness whatever in connection with said money order transaction, or that the manner of handling said money order transaction by these defendants was the proximate or any cause of the damage, if any, alleged to have been sustained by the plaintiffs, or either of them.

For A Second, Separate and Further Affirmative defense to Said Complaint Filed Herein, Defendants Allege:

I.

The money order referred to in the plaintiff's complaint was delivered to and accepted by the defendants subject to the terms of the standard money order contract of The Western Union Telegraph Company, a copy of which is hereto annexed, made a part hereof, and [10] marked Exhibit "A".

II.

As more fully appears from Exhibit "A" attached to this Answer, it was a term and condition of said contract that said defendant should not be liable for damages for delay, non-payment, or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of $500.00 at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid, the money order is hereby valued, unless a greater amount is stated in writing on the face of this application and an additional sum paid or agreed to be paid, based on such value equal to one-tenth of one per cent thereof.

III.

The money order received by the defendants in this case for transmission was received by it at the regular rate pertaining to all money orders valued at $500.00 at which amount the right to have said money order promptly and correctly transmitted and promptly and fully paid was valued by the sender thereof; there being no greater value stated in writing on the face of the application in this case, nor was any additional sum paid or agreed to be paid based on any greater value than $500.00.

IV.

The said money order was an interstate and foreign money order and was as such interstate, foreign and international commerce.

V.

Said defendant's standard form of money order provisions before referred to and set forth in Exhibit "A" attached to this answer was adopted, established, promulgated, offered to the public, and filed with the Interstate Commerce Commission prior to and in effect on the 1st day of September, 1937, and transferred to the Federal Communications Commission by the Communications Act of [11] 1934, and by defendant's rules on file as aforesaid, money orders were classified into those valued by the sender thereof at $500.00 and money orders valued by the sender thereof at some specified sum in excess thereof; that defendant's rates and tariffs being based on the assumption that the order is valued at $500.00 or less and in case of an order valued in excess thereof, it was the rule, regulation, tariff or practice of said defendant to charge and collect an additional sum based on the valuation and equal to one-tenth of one per cent thereof to cover the increased risk.

VI.

That by the Act of Congress approved June 18, 1910, (36 Statutes at Large 539) and the Communications Act of 1934, the Congress of the United States entered and assumed charge of regulating the field of interstate and foreign communication by telegraph, and thereby removed and exempted such interstate and foreign communication by telegraph from the field of the state regulation or

interference and undertook to and did confer upon the Interstate Commerce Commission and the Communications Commission full power over the rates, charges, facilities, classification and practice of telegraph companies engaged in interstate and foreign commerce and conferred on the Interstate Commerce Commission and the Federal Communications Commission and the Federal Communications Commission power to approve, alter or acquiesce in existing rates and classifications, which power the said Interstate Commerce Commission and the Federal Communications Commission have ever since retained and still retain.

VII.

That the said Interstate Commerce Commission and the Federal Communications Commission prior to said 1st day of September, 1937, had full knowledge of the rates, charges and classifications established by the defendant, as above described, and, with such knowledge, had acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications [12] or regulations and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above stated.

VIII.

By reason of which and of all the premises, the defendants allege that the valuation clause, subject

to which this money order was accepted, to the effect that the defendants should not be liable for delay, non-payment, or underpayment of this money order, whether by reason of negligence on the part of its agents, or servants, or otherwise, beyond the sum of $500.00, was reasonable, valid and binding on the plaintiffs herein and free from any regulation or control on the part of the State of California, or any other State; so that to hold the defendant liable in any event in this action, beyond the sum of $500.00 with interest from the 1st day of September, 1937, would be in contravention of Article 1, Section 8, Subdivision 3 of the Constitution of the United States, conferring on Congress power to regulate commerce among the several States and foreign Countries, and of the Acts of Congress passed and the orders of the Interstate Commerce Commission made in pursuance thereof, especially the Act approved June 18th, 1910, (36 Statutes at Large 539) and its amendments and the Communications Act of 1934.

Wherefore, defendants pray that plaintiffs take nothing by their complaint and that defendants go hence without day and receive its costs herein expended.

EDWIN CAMACK,
F. A. WATERS,
Attorneys for Defendants.

[13]

EXHIBIT "A".

Money Orders Are Subject to the Following Conditions:

Domestic orders will be cancelled and refund made to the sender if payment cannot be effected within 72 hours after receipt at paying office (Ellis Island, N. Y., excepted). Orders payable at Ellis Island will be canceled after the expiration of five days.

In the case of a Foreign Order the Foreign equivalent of the sum named in the order will be paid at the rate of exchange established by the Company or its agents on the date of the transfer.

In the case of a Foreign Order the equivalent, in the currency of the country of payment, of the sum named will be purchased promptly; and if for any reason payment cannot be effected, refund will be made by the Company and will be accepted by the depositor on the basis of the market value of such foreign currency in American funds, at New York, on the date when notice of cancelation is received there by the Company from abroad.

When the Company has no office at destination authorized to pay money, it shall not be liable for any default beyond its own lines, but shall be the agent of the sender, without liability, and without further notice, to contract on the sender's behalf with any other telegraph or cable line, bank or other medium for the further transmission and final payment of this order.

In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof. [14]

In the event that the company accepts a check, draft or other negotiable instrument tendered in payment of a money order, its obligation to effect payment of the money order, shall be conditional and shall cease and determine in case such check, draft or other negotiable instrument shall for any reason become uncollectible, and in any event the sender of this money order hereby agrees to hold the telegraph company harmless from any loss or damage incurred by reason or on account of its having so accepted any check, draft or negotiable instrument tendered in payment of this order.

THE WESTERN UNION
TELEGRAPH COMPANY,
Incorporated.
R. B. WHITE,
President.

State of California,
County of Los Angeles—ss.

J. W. Inwood, being by me first duly sworn, on oath says that he is the Superintendent and agent of the defendant, The Western Union Telegraph Company at Los Angeles, California, and that the same is a corporation and absent from the State of California for which reason he verifies the foregoing Answer of said defendant, in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and/or belief, and as to those matters that he believes it to be true.

J. W. INWOOD.

Subscribed and sworn to before me this 15th day of August, 1938.

[Notarial Seal] ALICE C. WEATHERWAX
Notary Public in and for said County and State.

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires April 8, 1941.

[Endorsed]: Filed Aug. 16, 1938.

R. S. ZIMMERMAN,
Clerk.

By L. B. FIGG,
Deputy Clerk.

[15]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between Counsel for the respective parties hereto that trial by jury is hereby expressly waived.

Dated: This 12th day of October, 1938.

A. J. O'CONNOR,
Attorney for Plaintiffs.

EDWIN CAMACK,
F. A. WATERS,
Attorneys for Defendants.

[Endorsed]: Filed Oct. 13, 1938. [16]

At a stated term, to wit: The September Term, A. D. 1938, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday the 9th day of November, in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable: Leon R. Yankwich, District Judge.

[Title of Cause.]

Judgment is ordered for the plaintiff against defendant Western Union Telegraph Company

only etc. in the sum of $500.00 and that plaintiffs recover nothing from defendant Inie. Counsel for plaintiffs will prepare Findings and Judgment under Rule 8. Opinion filed.
MB 2/99 [17]

[Title of District Court and Cause.]

OPINION

Appearances:

For the Plaintiffs,
AUGUST J. O'CONNOR,
Los Angeles, California.

For the Defendants,
EDWIN CAMACK,
F. A. WATERS,
Los Angeles, California.

Yankwich, District Judge:

On September 1, 1937, one of the plaintiffs, Paul Nester, presented himself at the main Los Angeles office of the defendant, telegraph company and asked that they transmit telegraphically a money order in the sum of one hundred fifty dollars to the plaintiff, Juan C. Charles, at Aramecina, Republic of Honduras. The two plaintiffs were engaged as partners in a mining venture at that place. Nester paid to the Company the sum of $157.14 for the money order. [18]

Through the negligence of the agents of the defendant telegraph company, the money was missent

to British Honduras and never was delivered to the sendee. By this action the plaintiffs seek to recover $7600.00 from the defendants as damages alleged to have been caused by the failure to transmit the money.

That the failure to deliver the money was due solely to the negligence of the agents of the telegraph company cannot be doubted. The receipt which was given to the plaintiff showed clearly that the destination was the Republic of Honduras. The message itself had the word "British" written above the word Honduras in the handwriting of the clerk who prepared the message. Even assuming that the word "British" had been on the money order when it was signed by the sender, it was the duty of the telegraph company holding itself out as engaged in the business of transmitting money to foreign countries, when given the locality (ARAMECINA) to ascertain the correct location and to see that the money was sent there. Failure to do so is gross negligence. We are satisfied from the receipt, from the physical aspect of the message itself and from the surrounding circumstances and the testimony of the plaintiff that the word "British" was not on the message at the time he affixed his signature to it. Whether it was added later on in good faith or in bad faith or whether the clerk in the employ of the defendant, whose knowledge of geography was deficient, may have added it, through sheer ignorance or inexperience, is unimportant. The sender cannot be charged with misleading the

telegraph company [redacted]s to absolve them of their own negligence.

The complaint sounds in tort. Damages for breach of contract are limited to such as may be reasonably supposed to have been within the contemplation of the parties at the time the contract was made. (California Civil Code, Sec. 3300; Hunt Bros. Co. v. San Lorenzo Water Co. (1906) 150 Cal. 51, 56; 87 P. 1093; Klepper v. American-La France etc. Co. (1930) 104 C. A. 254; 285 P. 1048). [19] There are exceptions to the rule. When a special purpose is sought to be achieved and this is known to the other party, recovery may be had for an unexpected loss. (Overstreet v. Merritt (1921) 186 Cal. 503; 200 P. 11; Hunt v. United Bank and Trust Co. (1930) 210 C. 108; 291 P. 184). Again one who breaches his contract in bad faith is liable for all damages traceable to the breach, including those which could not have been foreseen at the time the contract was made. (Kline v. Guaranty Oil Co. (1914) 167 C. 476; 140 P. 1; Westervelt v. McCullough (1924) 68 Cal. App. 198; 228 P. 734; Overstreet v. Merritt, supra).

A person injured by the tort of another may recover for all [redacted] detriment caused proximately by it whether it could have been anticipated or not. (California Civil Code, Sec. 3333; Hunt Bros. Co. v. San Lorenzo Water Co., supra; Myers v. Bradford (1921) 54 Cal. App. 157; 201 P. 471). There are authorities for the proposition that the negligent failure of the telegraph company to deliver a

message may form the basis of an action in tort, although the duty which is violated springs from a contract, (Union Construction Co. v. Western Union Telegraph Co. (1912) 163 Cal. 298; 125 P. 242; Western Union Telegraph Co. v. Cook, (C. C. A. 9, 1894) 61 Fed 624; Postal Telegraph & Cable Co. v. Nichols (C. C. A. 9, 1908) 159 Fed 643). The complaint here is so framed. However, the question is academic only, so far as the determination of this cause is concerned. The two items of special damages claimed by the plaintiffs were the loss of a shipment of gasoline, ore car, food-stuffs, and radio, through failure to pay the custom duties and storage charges, after the expiration of a six-day period of grace allowed under the law of the Republic of Honduras, and the loss of a mining leasehold.

There is no evidence in the record as to the date when the forfeiture was actually incurred. It appears that the shipment arrived at the nearest Honduran port on the 15th day of August, 1937. [20] So that, at the time the money was sent on September 1, the grace period had already expired and the shipment was already subject to seizure and sale by the Honduran Government. The Honduran partner, Charles, who was a witness at the trial, was unable to testify, of his own knowledge, either as to the forfeiture or its date and stated that he never received any notice of forfeiture direct from the customs authorities or witnessed a sale of the goods for nonpayment of charges. No official notification of any kind by the authorities was prof-

fered in evidence, although the court called for such a document and was willing to give evidentiary value to it without other proof than its own indicia of authenticity. Under the circumstances, the loss of these goods, valued at about five hundred dollars, cannot be traced to the nondelivery of the money.

Nor is there evidence in the record to substantiate the claim that the failure of this small sum of money to arrive early in September was responsible for the loss of the mining leasehold interest of the partnership.

The evidence is clear that the operation of the leasehold continued for many months thereafter and that it was not surrendered until the month of May of the following year. More, even at the present time, the mine covered by the leasehold and others are owned by a Honduran corporation, El Porvenir, in which both partners are still interested. So that, assuming that the action is in tort, there is no substantial proof of any of the special damages claimed.

However, the plaintiffs are not without redress. For the money order was accepted by the defendant under a condition, filed with its schedule of rates with the Federal Communications Commission, which read:

> "In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, [21] *beyond the sum of five hundred dollars, at which amount the*

right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, UNLESS a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof." (Italics are by the Court.)

This undertaking is a provision for liquidated damages, which entitled the sender to recovery of the minimum amount of five hundred dollars in the absence of any proof or without any offer of proof. Sun Printing & Publishing Association v. Moore (1902) 183 U. S. 642; Ayers & Graves v. United States (C. C. A. 5, 1938) 95 Fed. (2) 502; Hanlon Dry Dock & Ship Building Co. v. G. W. McNear, Inc. (1925) 70 C. A. 204; 232 P. 1002). A carrier or a telegraph company cannot relieve itself by contract from its own negligence. (Union Construction Co. v. Western Union Telegraph Co., supra; Western Union Telegraph Co. v. Cook, supra). But it may limit its liability, and if the limitation be fair, applicable to all similarly situated and be the basis for the rate to be paid by the sender, it is not contrary to public policy. (Adams Express Company v. Croninger, (1912) 226 U. S. 491; Kansas City Southern Ry. v. Carl (1913) 227 U. S. 639; San Giorgio I. v. Rheinstrum Co. (1935) 294 U. S. 494; Donlan Bros. v. Southern Pacific Co. (1907) 151 C. 763; 91 P. 603; Mering v. Southern

Pacific Co. (1911) 161 C. 297; 119 P. 80; Klotz v. Western Union Telegraph Co. (1920) 187 Iowa 1355; 175 N. W. 825). Hence although we are unable to award to the plaintiffs the special damages they ask, they are entitled, under the facts alleged and proved, to the sum stipulated as liquidated damages in the contract.

The allegation of damages in a complaint, while essential, is not the cause of action. (United States v. Standard Oil Co. of [22] California (1937) 21 Fed Sup 645, 660). The new federal rules of civil procedure do not speak of causes of action, but of claims and claims for relief (see Rule 8, Federal Rules of Civil Procedure; and see, United States v. Memphis Cotton Oil Co. (1933) 288 U. S. 62). Under the liberal rules of the reformed procedure, a plaintiff is entitled to recover, not on the basis of his allegations of damages or of his theory of damages, but on the basis of the facts as to damages shown in the record. This liberality is carried over into the new rules. In fact it is broadened. Differences in the forms of claims being abolished, the plaintiff should be denied relief only when, under the facts proved, he is entitled to none. (Rule 2, Federal Rules of Civil Procedure; Yankwich, New Federal Rules of Civil Procedure, (1938) pp. 14-15; Yankwich: The Theory of Pleading in California (1930) 3 N. Y. U. Law Quarterly Review, 285; Martin v. Howe (1922) 190 Cal. 187, 193; 211 P. 453; Wiseman v. Sklar (1930) 104 Cal. App. 369; 285 P.

1081; Arbuckle v. Clifford P. Reid, Inc. (1931) 118 Cal. App. 272; 4 P (2) 978; Tracy v. Stock Assurance Bureau (1933) 132 Cal. App. 573; 23 P (2) 41). Here the plaintiffs, under the facts alleged in the complaint and proved at the trial, have shown themselves entitled to recovery, even though they were unable to prove the damages they sought. Under the circumstances, recovery may be had without amending the pleadings to conform to the evidence. The more so as the clause for limitation of liability, under which the award is made, was brought into issue by the defendants. (Cf. Rule 15 (b) Federal Rules of Civil Procedure) who set it up in their answer and alleged that *under no circumstances** could they be held liable beyond the amount limited by it.

Judgment will, therefore, be for the plaintiffs in the sum of $500.00 against the Western Union Telegraph Company only. Plaintiffs take nothing against the defendant J. T. Inie. [23]

Findings and judgment to be prepared by the plaintiffs under Rule 8.

Dated this 9th day of November, 1938.

LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed Nov. 9, 1938. [24]

*Italics are by the Court.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Edwin Camack, F. A. Waters, Pillsbury, Madison & Sutro, and Lawler, Felix & Hall are hereby substituted as attorneys for defendant, The Western Union Telegraph Company, in place of Edwin Camack and F. A. Waters.

Dated: November 19, 1938.

THE WESTERN UNION
TELEGRAPH COMPANY,
By J. W. INWOOD,
Superintendent.

We consent to the foregoing substitution.

Dated: November 19, 1938.

EDWIN CAMACK,
F. A. WATERS,
PILLSBURY, MADISON &
SUTRO,
By ALFRED SUTRO,
LAWLER, FELIX & HALL,
By OSCAR LAWLER,
800 Standard Oil Building,
Los Angeles, California.

[Endorsed]. Filed Nov. 23, 1938. [25]

[Title of District Court and Cause.]

OBJECTIONS TO FORM OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Conforming to Rule 8 of the Rules of Procedure for the District Court of the United States for the Southern District of California, defendant, The Western Union Telegraph Company, objects to the proposed Findings of Fact and Conclusions of Law served on counsel for said defendant on November 17, 1938, on the following grounds:

I.

Objection is made to Finding of Fact VI on the ground that such finding states that "Western Union Telegraph Company, a corporation, was engaged in the business of transmitting money and messages by telegraph and cable for hire between the City of Los Angeles, State of California, and the village of Aramecina, Republic of Honduras." By paragraph IX of the complaint, it is alleged that Western Union Telegraph Company "*together with its connecting lines*"* was so engaged in transmitting money and [26] messages, and this averment of the complaint was not denied by the answer (see paragraph II of the answer). It was thus an admitted fact that that defendant was in the business of transmitting money to Honduras, not over its own lines, but solely by means of *connecting lines*.

*Italics in these objections indicate emphasis in the original.

2.

Objection is made to Finding of Fact VII on the ground that such finding states that Paul Nester paid to Western Union Telegraph Company the sum of One Hundred and Fifty Dollars ($150.00) "to be transmitted and paid to Juan C. Charles at Aramecina, *Republic of* Honduras." This is contrary to the evidence. The message delivered to the local agent of The Western Union Telegraph Company did not contain the words "*Republic of* Honduras." The evidence may be conflicting (as indicated by the opinion of the Court) as to when the word "British" before the word "Honduras" was placed upon the message handed to the telegraph company, but there was no evidence whatever indicating that the words "*Republic of*" ever preceded the word "Honduras" upon such message.

3.

Objection is made to Finding of Fact VII on the ground that such finding states that The Western Union Telegraph Company was paid the sum of $7.44. The evidence is undisputed that the amount paid the telegraph company was $6.44. From the allegations of the complaint (paragraphs IX and X) it will appear that $7.44 was originally paid, but that $1.00 was refunded to plaintiff Nester. Since paragraph VII of the findings assumes to state the ultimate facts referred to in paragraphs IX and X of the complaint, the true fact, viz., the receipt of $6.44 instead of $7.44 should be stated.

4.

Objection is made to Finding of Fact VII on the ground that such finding states that The Western Union Telegraph Company gave to Paul Nester a receipt showing "the destination, to wit: Aramecina, *Republic of* Honduras." This is contrary to the evidence. There can be no dispute that the receipt given Paul Nester for the money showed the destination to be "Aramecina, Honduras."

5.

Objection is made to Finding of Fact VIII on the ground that such finding states that The Western Union Telegraph Company negligently failed and neglected to transmit the money, although the evidence failed to show that such failure or neglect was due to any negligence on the part of such defendant.

6.

Objection is made to Finding of Fact VIII on the ground that such finding states that the misdirecting of the money was *gross negligence* on the part of Western Union Telegraph Company, although the evidence failed to show that any misdirection of the money was due to gross or any negligence on the part of such defendant.

7.

Objection is made to Finding of Fact IX on the ground that the averments of this finding do not fully meet the issues made by the pleadings and the

proof admitted thereon. By paragraph V of the second and affirmative defense to the complaint, this defendant alleged that the clause referred to in Finding of Fact IX and other provisions had been adopted, established, promulgated, offered to the public, and filed with the Interstate Commerce Commission prior to September 1, 1937 and transferred [28] to the Federal Communications Commission by the Communications Act of 1934. The proof at the trial by certified copy of the schedule of charges showed that the provision referred to in Finding of Fact IX had been adopted, promulgated and filed under an order of the Interstate Commerce Commission. Therefore, this defendant requests that Paragraph IX of the proposed Findings be altered to read as follows:

"The Court finds that on September 1, 1937, and for many years prior thereto, defendant The Western Union Telegraph Company, was engaged as a common carrier for hire in interstate and foreign communication by wire, and that the money order was accepted by the defendant, The Western Union Telegraph Company, under a condition which was a part of a schedule of charges adopted, established, promulgated, offered to the public, and filed with the Interstate Commerce Commission prior to 1934, and, since 1934, in effect and on file with the Federal Communications Commission, pursuant to the requirements of the Communications Act of 1934; that said condition reads:

"'In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth one per cent thereof.'" [29]

8.

Objection is made to the proposed Findings of Fact on the ground that there has been a failure to find upon material issues presented by the pleadings in this: That by paragraph XIV of the complaint certain damages to the plaintiffs are specifically alleged, and these allegations are specifically denied by paragraph VII of the answer, and the proposed Findings of Fact make no finding upon these issues. This defendant requests that a new paragraph be added to the proposed Findings of Fact reading as follows.

"That it is not true that plaintiffs suffered any of the loss, damage or injury alleged in paragraph XIV of the complaint; that it is true that plaintiffs have not suffered or sustained any actual loss, damage, or injury;"

9.

Objection is made to Conclusion of Law I on the ground that such conclusion is contrary to law and is the imposition of a penalty upon and places an undue burden upon interstate and foreign commerce, and is and would be in conflict with subsection 3 of section 8 of Article I of the Constitution of the United States and acts of Congress passed in pursuance thereof, and particularly the Act of Congress approved June 18, 1910 (36 Stat. L. 539) and acts supplemental thereto and amendments thereof, and the Act of Congress of June 19, 1934 (48 Stat. L. 1064), known as the Communications Act of 1934, and amendments thereof.

10.

Objection is made to Conclusion of Law II on the ground that the declaration therein that plaintiffs are entitled to recover the minimum amount of $500.00 without further proof of [30] special damage against Western Union Telegraph Company is contrary to law and is the imposition of a penalty upon and places an undue burden upon interstate and foreign commerce, and is and would be in conflict with subsection 3 of section 8 of Article I of the Constitution of the United States and acts of Congress passed in pursuance thereof, and particularly the Act of Congress approved June 18, 1910 (36 Stat. L. 539) and acts supplemental thereto and amendments thereof, and the Act of Congress of June 19, 1934 (48 Stat. L. 1064), known as the

Communications Act of 1934, and amendments thereof.

11.

Objection is made to Conclusion of Law III on the ground that the statement therein that plaintiffs are entitled to recover $500.00 is contrary to law and is the imposition of a penalty upon and places an undue burden upon interstate and foreign commerce, and is and would be in conflict with subsection 3 of section 8 of Article I of the Constitution of the United States and acts of Congress passed in pursuance thereof, and particularly the Act of Congress approved June 18, 1910 (36 Stat. L. 539) and acts supplemental thereto and amendments thereof, and the Act of Congress of June 19, 1934 (48 Stat. L. 1064), known as the Communications Act of 1934, and amendments thereof. Further objection is made to Conclusion of Law III on the ground that the $150.00 therein referred to, together with interest thereon, was heretofore by defendant, The Western Union Telegraph Company, paid to and received by counsel for plaintiffs for the account of plaintiffs, and said conclusion is therefore unnecessary for plaintiffs' protection and is prejudicial to this defendant. [31]

Defendant, The Western Union Telegraph Company, in accordance with said Rule 8, prays that unless the changes and additions referred to in these objections be adopted, this Honorable Court appoint a time for a hearing upon these objections

at which counsel for this defendant may appear and be heard thereon, and that said proposed Findings of Fact and Conclusions of Law be not adopted or signed until full effect has been given therein to each and all of the changes and additions referred to in these objections.

Dated: November 28, 1938.

EDWIN CAMACK,
F. A. WATERS,
PILLSBURY, MADISON & SUTRO,
LAWLER, FELIX & HALL,
Attorneys for Defendant, The Western Union Telegraph Company.

Objections overruled in part. Allowed in part. See Findings.

Signed L. R. Y.

[Endorsed]: Filed Dec. 5, 1938. [32]

[Title of District Court and Cause.]

OBJECTIONS TO FORM OF JUDGMENT

Defendant, The Western Union Telegraph Company, hereby objects to the proposed judgment herein and to the substance and form thereof on the ground that said proposed judgment is an imposition of a penalty upon and places an undue burden upon interstate and foreign commerce, and

is and would be in conflict with subsection 3 of section 8 of Article I of the Constitution of the United States and acts of Congress passed in pursuance thereof, and particularly the Act of Congress approved June 18, 1910 (36 Stat. L. 539) and acts supplemental thereto and amendments thereof, and the Act of Congress of June 19, 1934 (48 Stat. L. 1064), known as the Federal Communications Act, and amendments thereof.

Dated: November 18, 1938.

EDWIN CAMACK,
FRANK A. WATERS,
LAWLER, FELIX & HALL.
Attorneys for Defendant, The Western Union Telegraph Company.

[Endorsed]: Filed Nov. 18, 1938. [33]

At a stated term, to-wit: The September Term, A. D. 1938, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 5th day of December in the year of our Lord one thousand nine hundred and thirty-eight.

Present.

The Honorable: Leon R. Yankwich, District Judge.

[Title of Cause.]

The Court overrules the defendants' objections to proposed findings of plaintiffs, and signs findings of fact and conclusions of law as amended by the Court, and signs Judgment and orders that Judgment be filed and entered herein. Addendum to Opinion filed. [34]

[Title of District Court and Cause.]

ADDENDUM TO OPINION

Appearances:

For the Plaintiffs,
August J. O'Connor,
Los Angeles, California.

For the Defendants:
Edwin Camack,
F. A. Waters,
Los Angeles, California. [35]

Yankwich, District Judge:

In the defendant's objections to the findings, it is insisted that this interpretation of the contract overlooks the fact that various cases (Postal Telegraph Cable Co. v. Warren-Godwin Co. (1919) 250 U. S. 27; Western Union Telegraph Co. v. Esteve Bros. & Co. (1921) 256 U. S. 566; Western Union Telegraph Co. v. Priester (1928) 276 U. S. 252) interpreting liability clauses of this character in contracts of telegraph companies have referred to

them as "limitations of liability". These cases interpret the liability for unrepeated messages and hold that beginning with the exercise of control by the Federal Government over their rates in 1910, the undertakings on the part of telegraph companies, as to rates are matters of law and not of contract. The reference in these decisions to clauses of this character as "limitations of liability" does not stand in the way of interpreting the clause under consideration here as liquidation. Liquidated damages are a maximum limitation of liability. And while it is true that, in interpreting conditions attached to contracts which are under the supervision or control of a federal body, the requirement of uniformity and the safeguards against discrimination, should be borne in mind, words, whether used in a contract by a person whose business is not the subject of governmental control or by a common carrier, mean the same thing. Unless, of course, by their nature, they acquire a special significance when used in one connection which they do not have when used in another. But when a telegraph [36] company states that "the right to have a money order promptly and correctly transmitted and promptly and fully paid" is valued at a definite sum, it can mean one thing only,—that the parties *have agreed, for the purpose of the contract, upon a valuation as effectively as if they had agreed upon the value of a shipment of goods.** And having fixed

*Italics throughout this Opinion are by the Court.

the *value of the right of a person to have a thing done in a certain manner,* the company, even though it be a common carrier, should not, when it has violated that right and suit is brought for such violation, be heard to say that *it did not intend* to fix the value of the right *at the sum named but at a sum up to the sum named.*

In Sun Printing & Publishing Association v. Moore (1902) 183 U. S. 642, the damage clause read:

> "That for the purpose of this charter *the value of the yacht shall be considered and taken* at the sum of seventy-five thousand dollars ($75,000.00) * * * That our liability hereunto *shall in no case exceed the sum of seventy-five thousand dollars* ($75,000.00)" (Italics added)

It is impossible to see any difference between the wording in that agreement and the wording we are considering. If at all, the wording we are considering lends itself more readily to an interpretation as liquidated damages than this wording. For the wording under consideration fixes *the value of the right* to have the money order promptly and correctly transmitted and promptly and fully paid. If the sum mentioned be a maximum, dependent upon proof of actual damage, the words are meaningless. [37] We would have to eliminate them entirely from the contract because the clause ending with the words "beyond the sum of five hundred dollars" without the modifying phrase would, alone,

carry that meaning. The court in Wernick v. Western Union Telegraph Company (1937) 290 Ill. App. 569, 9 N. E. 72, in arriving at the conclusion contrary to ours did that very thing. They chose to eliminate from the contract the valuation clause. We have not the right to do so. If the interpretation results in injustice, either to the company or to some of its clients, this can be remedied readily. The fact that the Interstate Commerce Commission has not foreseen the possibility of interpreting the clause as a clause for liquidated damages means little. Even governmental regulatory bodies may be guilty of oversight. At any rate, their failure to read the contract as we read it is not a prior adjudication of its meaning which forbids our exercising independent judicial judgment. Nor does the ruling in South Eastern Express Company v. Pastime Amusement Company (1936) 299 U. S. 28, stand in the way of this interpretation. The court there merely held that, under a tariff for interstate shipment, there could be no recovery in excess of the amount at which goods were valued in the tariff. There, recovery was actually had in excess of the valuation. I consider this decision complementary to the Sun case. The Sun case holds that no recovery can be had *below* the valuation. This case holds that no recovery can be had *above* the valuation. [38]

We feel, therefore, that the interpretation we have placed upon this clause is valid, and that the cases discussed do not militate against it.

We adhere to the view expressed in the previous opinion.

Dated this 5th of December, 1938.

LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed Dec. 5, 1938. [39]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered, that the above entitled case came on regularly for trial in the above entitled Court before the Honorable Leon R. Yankwich, Judge Presiding;

Paul Nester and Juan Charles, plaintiffs, appeared in person and with their counsel August J. O'Connor, Esq., and defendants Western Union Telegraph Company, a corporation, and T. J. Inie were present in Court and represented by Edwin Camack, Esq., and F. A. Waters, Esq.

A jury having been waived by the parties, the Court proceeded to hear said cause, and the parties having introduced both oral and documentary evidence and the attorneys for the respective parties having argued said cause and the trial having been fully completed and submitted for decision, the Court being fully informed and advised in the premises,

Finds the Following Facts:

I.

It is true that Paul Nester and Juan Charles on or about [40] September 1, 1937, were co-partners engaged in operating El Porvenir mine under lease in the Republic of Honduras near the village of Aramecina.

II.

That at all times mentioned in plaintiff's complaint Paul Nester and Juan Charles were residents and citizens of the Southern District of California, Central Division of the State of California.

III.

That the Western Union Telegraph Company is a corporation duly organized and existing under and by virtue of the laws of the State of New York and authorized to do and doing business in the Southern District of California, Central Division, State of California, and was on September 1, 1937, and thereafter a resident and citizen of the State of New York.

IV.

That on September 1st, 1937, T. J. Inie was the duly appointed and acting employee of the Western Union Telegraph Company, a corporation, and was acting within the scope of her authority.

V.

That the amount in controversy, exclusive of costs and interest, is over three thousand dollars.

VI.

That on September 1, 1937, and for a long time prior thereto and from thence hitherto the Western Union Telegraph Company, a corporation, together with its connecting lines was engaged in the business of transmitting money and messages by telegraph and cable for hire between the City of Los Angeles, State of California and the village of Aramecina, Republic of Honduras.

VII.

That on the 1st day of September, 1937, in the City of Los Angeles, California, Paul Nester paid to the Western Union Telegraph Company, through its agent T. J. Inie, the sum of one hundred and [41] fifty dollars ($150.00) to be transmitted and paid to Juan C. Charles at Aramecina, Republic of Honduras, and paid said Western Union Telegraph Company therefor the sum of six dollars and forty-four cents ($6.44) for the transmission of said sum to said Juan C. Charles. That thereupon the Western Union Telegraph Company gave to Paul Nester a receipt showing the receipt of said money and the payee Juan C. Charles, and the destination, to-wit: Aramecina, Honduras.

VIII.

That said Western Union Telegraph Company negligently failed, and neglected to transmit and pay said money to John C. Charles at Aramecina, Republic of Honduras, or at any other place, or at

all in accordance with its undertaking, but by reason of its gross negligence misdirected said money to "Aramecina, British Honduras".

IX.

The Court finds that the money order was accepted by the defendant, the Western Union Telegraph Company, under a condition filed with its schedule of rates with the Federal Communications Commission, which read:

> "In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, UNLESS a greater value is stated in writing on the face of the application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

X.

That on October 13, 1937, defendant Western Union Telegraph [42] Company wired Paul Nester informing him that Juan Charles, his co-partner, had taken payment of said one hundred and fifty dollars ($150.00) money order that day.

XI.

That the Western Union Telegraph Company in the ordinary course of prompt transmission and delivery and payment of such money orders should, and could, have delivered and paid the same to Juan C. Charles at Aramecina, Republic of Honduras on or about the 3rd day of September, 1937.

XII.

That it is not true that by reason of the failure of the defendant, Western Union Telegraph Company, to transmit and to deliver and to pay promptly said money order as aforesaid, the plaintiffs have suffered damages in the sum of Seventy-six hundred ($7,600.00) Dollars; the court finds, however, that by reason of such failure, the plaintiffs have suffered and sustained damages, loss and injury in the sum of Five Hundred ($500.00) Dollars.

Conclusions of Law

I.

That the condition on the application for the transmission of the money order filed by the Western Union Telegraph Company with the Federal Communications Commission limiting its liabilities to five hundred ($500) dollars is a valid undertaking.

II.

That Paul Nester and Juan Charles, co-partners plaintiff are entitled to recover the amount of five

hundred dollars ($500.00) against the Western Union Telegraph Company only, and not against T. J. Inie.

III.

That Paul Nester and Juan Charles, co-partners plaintiff are entitled to recover said five hundred ($500) dollars without prejudice to their right to sue for and recover the one hundred and fifty ($150) dollars paid to the Western Union Telegraph Company, a corporation, for transmission and payment to Juan Charles at Aramecina, Republic of Honduras, in a Court of proper jurisdiction.

[43]

IV.

That counsel for Paul Nester and Juan Charles, co-partners, are directed hereby to prepare judgment in accordance with these findings of fact and conclusions of law, and for costs taxed in the sum of $.....

Dated: December 5, 1938.

LEON R. YANKWICH,
Judge of the United States
District Court.

Approved:

.....

.....

Attorneys for Defendants.

Disapproved as to form: On the basis of written objections which will be hereafter filed in accordance with Rule 8 of this court.

EDWIN CAMACK,
F. A. WATERS,
Attorneys for Defendants.

For the following reasons.

Received copy of the within Findings of Fact and Conclusions of Law this 17th day of November, A. D. 1938, at the hour of 12:15 p. m. of said day.

EDWIN CAMACK,
F. A. WATERS,
Attorneys for Defendants.

[Endorsed]: Filed Dec. 5, 1938. [44]

In the District Court of the United States of America, Southern District of California, Central Division.

No. 8447-Y

PAUL NESTER and JUAN CHARLES, co-partners.

Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY, a corporation, DOE CORPORATION, DOE TWO CORPORATION, T. J. INIE, JOHN DOE ONE and JOHN DOE TWO,

Defendants.

JUDGMENT

The Court, having made, signed and filed, its Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed that Paul Nester and Juan Charles, co-partners, plaintiffs, have judgment in the sum of Five Hundred ($500.00) Dollars against the Western Union Telegraph Company, a corporation, only, and for their costs taxed in the sum of $69.11.

Cause dismissed as to T. J. Inie.

Done in open Court this 5th day of December, A. D. 1938.

LEON R. YANKWICH,
Judge of the District Court
of the United States of
America.

Approved:

.....,

.....,

Attorneys for Defendants.

Disapproved as to form for the following reasons: .....

Judgment entered and recorded Dec. 5, 1938.

R. S. ZIMMERMAN,
Clerk,

By LOUIS J. SOMERS,
Deputy Clerk.

Entered C O B 1/266

[Endorsed]: Filed Dec. 5, 1938. [45]

[Title of District Court and Cause.]

CONDENSED STATEMENT IN NARRATIVE FORM OF ALL OF THE TESTIMONY (INCLUDING ALL EXHIBITS RECEIVED IN EVIDENCE).

Pursuant to Federal Rule of Civil Procedure 75 (c) defendant, The Western Union Telegraph Company, which has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on December 5, 1938, serves and files with its designation of contents of record on appeal the following condensed statement in narrative form of all testimony, including all exhibits received in evidence, at the trial of this cause in the United States District Court for the Southern District of California, Central Division, such condensed statement being a complete record and including all proceedings and evidence in the action:

Condensed Statement

This cause came on regularly for trial on November 1, 1938, in said District Court before the Honorable Leon R. Yankwich, Judge thereof, and there continued on trial on November [46] 1 and 2, 1938. August J. O'Connor, Esquire, appeared as counsel for plaintiffs and Edwin Camack, Esquire, and F. A. Waters, Esquire, appeared as counsel for defendants. The attorneys of record of the parties having filed with the Clerk a stipulation in writing

waiving a jury, the cause was tried to the Court upon the issues as joined by the complaint and answer. Upon such trial the following proceedings were had and testimony taken and the following exhibits were introduced in evidence: [47]

PAUL NESTER,

one of the plaintiffs, called and sworn as a witness for plaintiffs, testified as follows:

Direct Examination

I reside on Malibu Road (Los Angeles County) and am a Deputy Sheriff of Los Angeles County. On or about September 1, 1937, Juan C. Charles and I were partners in a mining venture in Honduras, Central America. Our property there was the El Porvenir gold-silver quartz mine. Mr. Charles and I had a purchase contract, or option and lease, covering that property. On or about September 1, 1937, Mr. Charles was at the El Porvenir mine in Honduras and I was at Pacific Palisades in the County of Los Angeles. About 11 A. M. on September 1, 1937, I went to the Western Union office on Spring Street, between Sixth and Seventh Streets in the City of Los Angeles. There I told the clerk at the counter I wanted to wire to one Juan C. Charles, at Aramecina, Republic of Honduras, Central America the sum of $150. I signed a paper and paid her $150 plus a fee of $7 and some odd cents. The girl referred to some book behind the counter and then informed me that she could forward the money to that destination. Then she

(Testimony of Paul Nester.)

proceeded to write out the application blank, or whatever it is they fill out, and handed it to me for my signature. I asked the girl when it would be delivered, and, if it was not delivered, when I would be notified that it was not delivered. She said that it might get out of the New York office by 12:00 o'clock; that if it was not, that it would be delivered the next day, and that if it was not delivered that I would be notified in three days.

That is the instrument (referring to paper shown witness) that I signed. It is, however, not in the same condition now as it was at the time I signed it. This instrument contains [48] parentheses around the "Honduras"; also the word "British" has been written in on top of the word "Honduras." Otherwise it is the same. The word "British" was not upon that instrument when I signed it.

The following exhibit was then offered and received in evidence as Plaintiffs' Exhibit 1:

(On the face appears the following) [49]

PLAINTIFF'S EXHIBIT 1

Form 72 H

No. 244

WESTERN UNION

Amount 150.00

Time Filed 1.46 PM

MONEY ORDER

Money Order Charge 3.00

Received by S-H

30¢ 4.04

Telegraph Tolls 10

Sent by H

R. B. White, President — Newcomb Carlton, Chairman of the Board — J. C. Willeyer, First Vice-President

Total 157.14

Subject to the conditions below and on back hereof, which are hereby agreed to,

(Stamp impression)
S LOS ANGELES, CALIF
SEP 1 1937
Office

H 19....
Date

(in pencil)
PAY TO Juan C. Charles

If to a woman give prefix Mrs. or Miss, if practicable

(In pencil) (British)
Street Address Aramecina (Honduras)

Give House Number and Street

Place .....

Amount ..... Dollars and ..... Cents ($ .....)

(A message, to be delivered with the money, costs but a little more and saves a separate telegram. It may be written on the following lines)

Message to be delivered with the money: .....

.....

.....

Positive evidence of personal identity is NOT to be required from the Payee, and I authorize and direct the Telegraph Company to pay the sum named in this order at my risk to such person as its agent believes to be the above named Payee,* UNLESS the following is signed.

POSITIVE PERSONAL IDENTIFICATION REQUIRED

I desire that the above named payee shall be required to produce positive evidence of personal identity before payment is made.

Signature .....

*Information for test question for identifying payee .....

Signature (In pencil) Paul Nester

Sender's Address (In pencil) 18125 Malibu Rd. for Reference

Sender's Telephone Number .....

(In pencil) Malibu 26161 —leave msg

In Case of Foreign Money Orders: Pay United States Dollars ☐ Pay in Local Currency ☐

vs. Paul Nester et al.

55

MICRO CARD 22

TRADE MARK ®

39



15513



(Testimony of Paul Nester.)

(The following also appears on the face)

(In longhand by pen and ink)

Defendant's Exhibit A for Identification.

WILLIAM J. STAHLY,
Notary Public.

(superimposed on last three lines)

Photostatic Copy

Date (in longhand) 7/18.

Sent to (in longhand) Comcl svc LA.

For (in longhand) DC.

(Superimposed over above signature)

Entered
1937 Sep - 6
Pacific
Div [50]

(On the reverse side of Exhibit 1 appears the following):

Money Orders Are Subject to the Following Conditions:

Domestic orders will be canceled and refund made to the sender if payment cannot be effected within 72 hours after receipt at paying office (Ellis Island, N. Y., excepted). Orders payable at Ellis Island will be canceled after the expiration of five days.

In the case of a Foreign Order the Foreign equivalent of the sum named in the order will be paid at the rate of exchange established by

(Testimony of Paul Nester.)

the Company or its agents on the date of the transfer.

In the case of a Foreign Order the equivalent, in the currency of the country of payment, of the sum named will be purchased promptly; and if for any reason payment cannot be effected, refund will be made by the Company and will be accepted by the depositor on the basis of the market value of such foreign currency in American funds, at New York, on the date when notice of cancelation is received there by the Company from abroad.

When the Company has no office at destination authorized to pay money, it shall not be liable for any default beyond its own lines, but shall be the agent of the sender, without liability, and without further notice, to contract on the sender's behalf with any other telegraph or cable line, bank or other medium, for the further transmission and final payment of this order.

In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, unless a greater

(Testimony of Paul Nester.)

value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

In the event that the company accepts a check, draft or other negotiable instrument tendered in payment of a money order, its obligation to effect payment of the money order shall be conditional and shall cease and determine in case such check, draft or other negotiable instrument shall for any reason become uncollectible, and in any event the sender of this money order hereby agrees to hold the telegraph company harmless from any loss or damage incurred by reason or on account of its having so accepted any check, draft or negotiable instrument tendered in payment of this order.

All messages included in money orders are subject to the following terms:

To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated message and paid for as such, in consideration whereof it is agreed between the sender of the message and this company as follows:

1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission

(Testimony of Paul Nester.)

at the unrepeated-message rate beyond the sum of five hundred dollars; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the repeated-message rate beyond the sum of five thousand dollars, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

2. In any event the company shall not be liable for damages for mistakes or delays in the transmission or delivery, or for the non-delivery, of any message, whether caused by the negligence of its servants or otherwise, beyond the sum of five thousand dollars, at which amount each message is deemed to be valued, unless a greater value is stated in writing by the sender thereof at the time the message is tendered for transmission, and unless the repeated-message rate is paid or agreed to be paid, and an additional charge equal to one-tenth of one per cent of the amount by which such valuation shall exceed five thousand dollars.

3. The company is hereby made the agent of the sender, without liability, to forward this message over the lines of any other company when necessary to reach its destination.

4. No responsibility attaches to this company concerning messages until the same are accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messen-

(Testimony of Paul Nester.)

gers, he acts for that purpose as the agent of the sender.

5. The transferring of the money and the transmission of the message together constitute one transaction and the cancelation by either the sender or the company of the money order cancels also any obligation on the part of the company to deliver the message. The message will be delivered to the payee of the money order only as and when the money is paid.

6. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

7. It is agreed that in any action by the company to recover the tolls for any message or messages the prompt and correct transmission and delivery thereof shall be presumed, subject to rebuttal by competent evidence.

8. No employee of the company is authorized to vary the foregoing.

THE WESTERN UNION
TELEGRAPH COMPANY
Incorporated
R. B. WHITE,
President. [51]

(Testimony of Paul Nester.)

I received a receipt for the $150 that I paid. That (referring to a document shown the witness) is a fair representation of the original that I received on September 1, 1937.

The following exhibit was then offered and received in evidence as

PLAINTIFFS' EXHIBIT 2:

(On the face appears the following) 4178
The Western Union Telegraph Company

Receipt

Sep 1 1937

Received from Paul Nester ($150.00) Dollars, in payment of:

( ) Account for the month of ..... 19.....
(X) Telegraphic Money Order
( ) Telegram or Cable
( ) Deposit on Collect Telegram
(Returnable after 24 hours)

To Juan C. Charles
At Aramecina (Honduras)

THE WESTERN UNION TELEGRAPH COMPANY,
By T. J. IVIE.

Money Order
Charges Paid $7.14

(Testimony of Paul Nester.)

(The following stamp appears immediately below the name "Paul Nester"):

Los Angeles, Calif.

S H

Sep 1 1937

(Portions underscored above are by pen and ink in longhand)

(On reverse side appears the following)

Money By
Telegraph and Cable

Money Orders—Telegraphed throughout the country. Payable during all open hours of Western Union offices during day or night, Sundays or holidays. Easy—Safe— [52] Speedy. No red tape. Message to payee included at small extra cost.

Shopping Orders—For the purchase and delivery at distant cities of gifts and other articles—including railroad, bus, airplane and theatre tickets. A message may be included.

Gift Orders—Solve the perplexing problem of what to give and combine sense and sentiment. Exchangeable anywhere for the gift most desired. Free sentiment for various occasions with each order.

Ask Manager for details. [53]

(Testimony of Paul Nester.)

On or about September 14, 1937, I received a letter from the Western Union with a check for $1.00. That letter (referring to a letter shown the witness) which is dated September 14, 1937, is the letter which I received.

The following exhibit was then offered and received in evidence as

PLAINTIFFS' EXHIBIT 3:

"The Western Union Telegraph Company

Los Angeles, Cal.
September 14, 1937.
File 103-C-V

J. W. Inwood
Superintendent

Mr. Paul Nester,
18125 Malibu Road,
Pacific Palisades, Calif.

Dear Sir:

I am enclosing our check for $1.00 in refund of the overcharge made in connection with the cable money order you sent from this city on September 1 to Juan C. Charles, Aramecina, British Honduras.

The overcharge resulted from a mistake made by our clerk in computing the charges, which indeed is regretted.

Yours very truly,
(Signed) J. W. INWOOD,
Superintendent."

(Testimony of Paul Nester.)

(On the reverse side, in longhand, appears the following:)

"Salizar
"Niagra 2258" [54]

After the receipt of that letter I went to the same office of the Western Union on Spring Street in the City of Los Angeles. I spoke to a man who evidently was in charge at that time, and told him that I had received a letter which stated that this money had been forwarded to Juan C. Charles, British Honduras, instead of Honduras. I wanted to know why, or if they had sent it to British Honduras. He took the letter and went back behind the counter and referred to certain records, and he came to the counter again and told me that that letter evidently was a mistake of the stenographer who wrote it; that their records show that that money had been sent correctly to Aramecina, Honduras. He even produced a book which showed the words "Aramecina, Honduras." He displayed the book after I questioned him regarding the use of the words "Republic of Honduras," and he said that the Western Union never used the words "Republic of"; that "Honduras" was sufficient, and that their records showed that the money had been directed correctly from that office to Aramecina, Honduras.

(Testimony of Paul Nester.)

Thereafter, on or about September 27, 1937, I received a letter from Mr. Juan C. Charles. After receiving that letter I went to the Western Union. I again spoke to the manager of the office. He was on the lower floor, behind the desk. I told him that I had forwarded $150 to Juan C. Charles, Aramecina, Honduras, on the 1st of September and that on the 14th day of September I had been in the office regarding this letter, and that at that time I was assured that the money had been dir ·ted properly in accordance with the address I had given them. I told him that I now had in my possession a letter in which Mr. Charles stated that he had not received that money; and I wanted them to start some investigation and see why they had not paid the money to Mr. Charles. The man said that he didn't know anything about [55] it but that he would immediately start checking and find out why. I told him that I wanted to be notified as soon as possible as to where that money was, and I wanted to be advised as to what the status of it was.

Thereafter, on or about October 13, 1937, I received a telegram from the Western Union. That (referring to telegram shown the witness) is the telegram that I received on the date it bears.

The following exhibit was then offered and received in evidence as

(Testimony of Paul Nester.)

PLAINTIFFS' EXHIBIT 4:

"1937 Oct 13 AM 9 32

"S57 DH Los Angeles Calif 13

"Paul Nester

18125 Malibu Rd Phone Malibu 26161

Leave MSG Pacific Palisades Calif Your Money Order Sept 1st Favor Juan C Charles Aramecina Honduras has now been paid Payee Took Delivery of Funds Today.

WESTERN UNION

TELEGRAPH CO." [56]

After the receipt of this telegram I received several letters from Mr. Charles at various times, wanting to know where that money was and what happened to it.

Prior to September 1, 1937, I had shipped a number of different shipments to my partner, Mr. Charles, from San Pedro, California. I believe these shipments went down on the boat S. S. "Coya." This manifest (referring to document shown the witness) correctly sets forth some goods that I sent down there.

"Mr. Waters: Mr. O'Connor, we will stipulate that Mr. Nester shipped the goods shown on this manifest or bill of lading of the Grace Line from Los Angeles on the 2nd day of Au-

(Testimony of Paul Nester.)

gust, 1937, and that it arrived at the port of Amapala, in Honduras, on the 15th day of August, 1937. Correct?

* * * * * * *

"Mr. O'Connor: I will accept counsel's stipulation, your Honor."

The following exhibit was then offered and received in evidence as

PLAINTIFFS' EXHIBIT 5:

(This exhibit consists of three bills of lading upon printed forms.) [57]

(On the face of the first of these bills of lading appears the following):

GRACE LINE

Grace Line

(M. S.) Ship (S. S.) "Coya" or substituted vessel.
Voyage No. 73.

Port of Loading, Los Angeles Harbor.

Final port destination (of goods), Amapala.

Bill of Lading Number 3.

Service (to be filled in by carrier) North Pacific.

Port of discharge (where the goods are to be delivered by the ship to consignee or to on-carrier), Amapal, Honduras, Central America.

Shipper (Name) Paul Nester. (Mail address) 18125 Malibu Road, Los Angeles, California. Code No..... Code No.....

(Testimony of Paul Nester.)

Consignee (Name) Agencia Nacional S. A. (Mail address) Agents for: Charles & Nester "El Porvenir.

"Mine-Aramecina Depto. Valle, Honduras, Central America .....

Notify (If consigned to shipper's order) (Name) ..... (Mail address) .....

(Subject to Clause 13.)

Shipper's Description of Goods
(See Clause 6 on the reverse side hereof)

Declared Value (See Clauses 17 and 18)	Marks and Numbers	No. of packages	Kind of packages	Contents	Weight Gross Kilos	Weight Gross Pounds	Weight Cubic Feet	Code No. Rate (To be filled in by carrier)
U. S. Cy. FOB Los Angeles	Charles Nester Amapala							
$ 87.00	#1	1	Piece	Ore car	272	600	286	.45
2.50	#2/3	2	Sacks	Blacksmith coal	91	200		.65
12.00	#57	1	Bale	Wire screen for mill	5	10		1.10
105.00	#4/53	50	Cases	Gasoline in tins on Deck	1,746	3,850		.60
10.70	#54/55	2	Cases	Lubricating oil on Deck	83	184		.55
39.95	#56	1	Case	Battery Radio receiving set complete	24	52	5	.85
		57	Packages	Total	2,221	4,896		

[79]

(Testimony of Paul Nester.)

FIFTY SEVEN PACKAGES TOTAL

Copy Non Negotiable FREIGHT PREPAID

(To be filled in by the carrier)

Code	Rate	Freight	Code		Rate	Freight
28#	.45	12.83	45-2	Surcharge		
200#	.65	1.30	45-2	Port Charge		
10#	1.10	.11	55-9	Landing Charge		
50 Cases	.60	30.00	55-11	Canal Transfer		
2 "	.55	1.10	45-2	Manifest Fee		1.00
5 Ft.	.85	4.25	55-5	Mexican Tax		
			55-3	Handling Charges		1.30
				State Tolls WHFOE		.49
				TRK TAX		.10
				TOTAL (of both columns)		~~52.54~~ 52.48

(Stamped, as follows:)
Prepaid

*(Figure $52.54 is stricken in ink, and $52.48 appears in longhand.)

Received by Grace Line Inc. or Panama Mail Steamship Company, as the case may be depending on which company operates the above named ship, herein referred to as "the Carrier", from the above named shipper, goods, or packages said to contain goods, or both, hereinabove described, in apparent good order and condition unless otherwise indicated

(Testimony of Paul Nester.)

herein, consigned to the above named consignee and to be held and transported, subject to all of the written, typed, printed and stamped provisions of this bill of lading, including expressly those set forth in Clauses 1 to 22, inclusive, on the reverse side hereof, which shall govern the relations between all parties concerned herewith, from the above named Port of Loading to the above named Port of Discharge or so [80] near thereunto as the ship can get safely and leave always safely afloat at all stages and conditions of weather and there, on payment of any amount then due and owing hereunder to the Carrier, to be delivered to consignee or on-carrier, as the case may be, when all responsibility of the Carrier shall terminate.

In Witness Whereof, two bills of lading have been signed, one of which being accomplished the others to stand void.

(Place and date of issue) Los Angeles, California, July 30th, 1937.

GRACE LINE, INC., or
PANAMA MAIL STEAMSHIP COMPANY,

By .....

Agent.

SS6433 Foreign. (See provisions on reverse side hereof.) Printed in U.S.A. [81]

(Testimony of Paul Nester.)

(On the face of the second of these bills of lading appears the following):

GRACE LINE

Grace Line: Bill of Lading Number 4.

(M. S.) Ship (S. S.) "Cuzco" (or substituted vessel).

Voyage No. 59.

Port of Loading, Los Angeles Harbor.

Final Port Destination (of goods) Amapala.

Service (To be filled in by carrier) North Pacific.

Port of Discharge (Where the goods are to be delivered by the ship to consignee or to on-carrier) Amapala, Honduras, C. A.

Shipper (Name) Paul Nester. (Mail address) 18125 Malibu Road, Los Angeles, Cal.

Code No..... Code No.....

Consignee (Name) Agencia Nacional S. A. (Mail address) Agents for Charles & Nester "El Porvenir."

Aramecina Depto., Valle, Honduras, Central America.

Notify (If consigned to shipper's order) (Subject to Clause 13). (Name)..... (Mail address).....

Shipper's Description of Goods

(See Clause 6 on the reverse side hereof)

(Testimony of Paul Nester.)

Declared Value (See Clauses 17 and 18)	Marks and Numbers	No. of Packages	Kind of Packages	Contents	Net Kilos	Weight Gross Kilos	Weight Gross Pounds	Cubic Feet	Code No. Rate (To be filled in by carrier.)
	Charles & Nester Amapala Honduras Central America								
	#1/20	20	drums	Gasoline— on Deck	2,803	3,257	7,180	215	
	#21	1	Drum	Lubricating Oil	173	196	432	10?	
		21	Packages	—Total	2,976	3,453	7,612	239?	

[82]

TWENTY ONE PACKAGES TOTAL
FREIGHT PREPAID

Copy Non Negotiable.

(The following stamp appears:)

Any provisions herein to the contrary notwithstanding goods may be received and/or delivered by carrier at ship's tackle and receipt and delivery beyond ship's tackle shall be entirely at the option of the carrier and solely at the expense of the shipper or consignee.

(To be filled in by the carrier)

Code	Rate	Freight	Code	Rate	Freight
7180#	.60	43.08	45-2	Surcharge	
10?	.375	4.03	45-2	Port Charge	
			55-9	Landing Charge	
			55-11	Canal Transfer	
			45-2	Manifest Fee	1.00
			55-5	Mexican Tax	
			55-3	Handling Charges	1.54
				State Tolls	1.18
				TRK TAX	.19
				TOTAL (of both columns)	XXXXX 51.02

(Testimony of Paul Nester.)

Received by Grace Line Inc. or Panama Mail Steamship Company, as the case may be depending on which company operates the above named ship, herein referred to as "the Carrier", from the above named shipper, goods, or packages said to contain goods, or both, hereinabove described, in apparent good order and condition unless otherwise indicated herein, consigned to the above named consignee and to be held and transported, subject to all of the written, typed, printed and stamped provisions of this bill of lading, including expressly those set forth in Clauses 1 to 22, inclusive, on the reverse side hereof, which shall govern the [83] relations between all parties concerned herewith, from the above named Port of Loading to the above named Port of Discharge or so near thereunto as the ship can get safely and leave always safely afloat at all stages of water and conditions of weather and there, on payment of any amount then due and owing hereunder to the Carrier, to be delivered to consignee or on-carrier, as the case may be, when all responsibility of the Carrier shall terminate.

In Witness Whereof, Two bills of lading have been signed, one of which being accomplished the others to stand void.

(Place and date of issue) Los Angeles, California, August 25, 1937.

GRACE LINE INC., or
PANAMA MAIL STEAMSHIP COMPANY,

By_____

Agent.

(Testimony of Paul Nester.)

(The following stamp appears:)
Prepaid

(See provisions on reverse side hereof)
SS6433 Foreign Printed in U.S.A: [84]

(On the face of the third of these bills of lading appears the following):

Grace line Bill of Lading Number 3.

GRACE LINE

Ship (M. S.)—(S. S.) "Condor" (or substituted vessel).

Voyage No. 77.

Port of Loading, Los Angeles Harbor.

Final Port of Destination (of goods) Amapala.

Service (To be filled in by carrier) North Pacific.

Port of Discharge (Where the goods are to be delivered by the ship to consignee or to on-carrier) Amapala, Honduras, C. A.

Shipper, Paul Nester, 18125 Malibu Road, Los Angeles, California, US of NA.

Code No. .....

Consignee, Agencia Nacional S. A., Agents for Charles & Nester "El Porvenir".

Mine-Aramecina-Depto. Valle-Honduras CA.

Code No. .....

Notify (If consigned to shipper's order (Subject to Clause 13) (Name) ..... (Mail address) .....

Shipper's Description of Goods

(See Clause 6 on the reverse side hereof)

(Testimony of Paul Nester.)

Declared Value (See Clauses 17 and 18)	Marks and Numbers	No. of packages	Kind of packages	Contents	Weight Gross Kilos	Weight Gross Pounds	Cubic Feet	Code No.	Rate (To be filled in by carrier)
	Charles & Nester Amapala								
	#5	1	Case	Canned Coffee	66	145			
	#6	1	Case	" Milk	25	55			
	#7	1	Case	" Tomato paste	16	35			
	#8	1	Case	" Tomatoes	27	60			
	#9	1	Case	" Tuna	16	35			
	#10	1	Case	" Apricots	29	65			
	#11	1	Case	Soap	19	41			
	#12	1	Case	Canned String Beans	21	47			
	#13	1	Case	" Spinach	28	61			
	#14	1	Case	" Sauer Kraut	21	47			
	#15	1	Case	" Chocolate	10	22			
									[85]
	#16	1	Case	" Preserves	24	54)			1.10
	#17	1	Case	" Assorted soups	24	53)			
				* * * * * *					
	#1	1	Case	Miner's carbide lamps & machinery parts	6	13	2		.55
	#2	1	Keg	Railroad Spikes	91	200			
	#40/43	4	Bbls.	38 Sheets Galv corrugated steel	250	551			
	#44	1	Roll	Galv. Barbed wire	46	101)			.50
	#45	1	Case	Iron Bolts	57	125)			
	#46	1	Case	Hardware	11	25	2		.55
	#51/62	12	Cases	Gasoline in cans	414	912	(215)		.60
	#63	1	Case	Lubricating Oil in cans	40	88	18		.375
	#65	1	Case)	) Groceries	36	80)	) 9		.55
	#66	1	Case)		21	47)			
	#67	1	Case	Parts for Mining Mill	88	193			
		38	Packages	Thirty eight Packages total	1,306	3,055			

(Testimony of Paul Nester.)

(To be filled in by the carrier)

Code	Rate	Freight	Code	Rate	Freight
.12 CS	.60	7.20	45-2	Surcharge	
18	.375	.62	45-2	Port Charge	
720#	1.10	7.92	55-9	Landing Charge	
13 FT	.55	7.15	55-11	Canal Transfer	
977#	.50	4.89	45-2	Manifest Fee	1.00
			55-5	Mexican Tax	
			55-3	Handling Charges	.69
				State Tolls	.32
				TRK TAX	.09
		TOTAL		(of both columns)	29.88

(Documents stamped as follows:)
Copy Non Negotiable

[86]

Received by Grace Line Inc. or Panama Mail Steamship Company, as the case may be depending on which company operates the above named ship, herein referred to as "the Carrier", from the above named shipper, goods, or packages said to contain goods, or both, hereinabove described, in apparent good order and condition unless otherwise indicated herein, consigned to the above named consignee and to be held and transported, subject to all of the written, typed, printed and stamped provisions of this bill of lading, including expressly those set forth in Clauses 1 to 22, inclusive, on the reverse side hereof, which shall govern the relations between all parties concerned herewith, from the above

(Testimony of Paul Nester.)

named Port of Loading to the above named Port of Discharge or so near thereunto as the ship can get safely and leave always safely afloat at all stages of water and conditions of weather and there, on payment of any amount then due and owing hereunder to the Carrier, to be delivered to consignee or on-carrier, as the case may be, when all responsibility of the Carrier shall terminate.

In Witness Whereof, Two bills of lading have been signed, one of which being accomplished, the others to stand void.

(Place and date of issue) Los Angeles, California, October 9, 1937.

GRACE LINES INC., or
PANAMA MAIL STEAMSHIP COMPANY,

By .....

Agent.

SS633 Foreign. (See provisions on reverse side hereof.) Printed in U.S.A. [87]

I had shipped down a mill to my partner. Its tonnage was 15 tons per day. I purchased that equipment in Los Angeles and sent it from the port of San Pedro. Prior to September 1, 1937, I had gone down to the mine. I was down at the mine after the mill was erected. I was at the mine before the mill was shipped and I was there after it was erected. The mill was actually assembled at the El Porvenir mine, outside of Aramecina, Honduras, and in oper-

(Testimony of Paul Nester.)

ation. The value of the mill, erected there in Aramecina, Honduras, was $4,000 or $4,500.

In May of 1938, I went with you (i. e., plaintiffs' counsel, Mr. O'Connor) to the Western Union offices. I believe we saw Mr. Inman.

"Mr. O'Connor: And I may be able to get a stipulation from counsel on that question.

"Mr. Waters: I think we can stipulate that there was a draft drawn for the amount of the principal involved here, $150, and was never cashed. I think it is in the possession of counsel at the present time. That is correct, isn't it?

"Mr. O'Connor: I am perfectly willing that the record show this, your Honor. That on July the 1st, 1938, a check for $150 was made payable to Paul Nester, with a letter of June 6, 1938, but that was never accepted as payment, your Honor.

"The Court: All right. In other words, it will be stipulated that the money was never actually paid.

"Mr. O'Connor: The $150 was at no time paid to the payee, Juan C. Charles, and was never paid to Paul Nester, the sender.

"The Court: All right." [88]

We asked Mr. Inman whether or not his records showed what happened to that money, where it was, and he was unable at that time to give us any definite information other than that they considered that it

(Testimony of Paul Nester.)

had been paid. He said that he would immediately start further investigation and he said that he would notify Mr. O'Connor as to the results. Mr. Inman said he was sorry that the money had been missent to the wrong place; that he was sorry the trouble had been caused; that they would do what they could in order to rectify the situation; that he would have a tracer sent through and find out where that money was; and that he would notify Mr. O'Connor what the results of his investigation were. Mr. Inman stated that, according to their records, payment had been made; but if that had not, he would find out and let us know, and he would try to make amends for what had been done.

The mine is located about seven miles from Aramecina, Honduras, Central America.

Prior to September 1, 1937, I had sent money in this manner to Mr. Charles, on several different occasions. On or about May 20, 1937, I sent him $500, and again, during the latter part of June, 1937, I sent him another $500. The reasonable value of the gasoline in this equipment that was sent there was in the neighborhood of $500.

Cross Examination

In referring to the value of the gasoline and other articles, I am referring to their value at Amapala. In my estimate of value I am considering the freight that was paid to the Grace Line for shipment of the goods from Los Angeles. Consular fees are fees that

(Testimony of Paul Nester.)

have to be paid to the consul of the country to which the goods are shipped, and are paid here. In my estimate of $500 I attribute over one-half of that to the value of the [89] goods. In arriving at the $500 I did not attribute anything to consular fees.

I first went down there to the mine with Mr. Charles in August of 1936. The next time I went down there was in January of 1938. I did not go down there at all in 1937. After the shipment that was made by me and which left Los Angeles about August 2, 1937, and arrived at Amapala on August 15, 1937, I made several subsequent shipments of gasoline to Amapala. The first of such subsequent shipments was approximately thirty days afterwards. It went down there by the next boat. I don't know what date it left Los Angeles. Approximately thirty days later I made another shipment. That was approximately sixty days after the date of the sailing of the "Coya." Those were shipments of gasoline. Both of those subsequent shipments were to Mr. Charles. The purpose of those shipments and the gasoline shipped was to be used to operate the mine. Some of the gasoline in the second or third shipment was used in the operation of the mine but all of it was not so used. After the third shipment of gasoline to which I have referred, I do not recall that there was any further shipment made of gasoline. After the third shipment to which I have referred I shipped other supplies to Honduras several times. I can't recall the exact times.

(Testimony of Paul Nester.)

The last shipment was made down there about three or four months ago. I don't recall the date. The supplies thus shipped were general supplies for the operation of the mines. We continued the operation of the mines until May of 1938. Because of the forfeiture of the original shipment we were shut down for three months so far as operating the mill was concerned. Then we resumed the mill operation as long as we had water. It was only a period of several weeks. Then we attempted to hold possession of the property by doing other work up until [90] the wet season. We didn't have the funds to develop the water which we would have been able to develop had we been able to operate those three months. What really shut us down after we started operations there in the fall was the scarcity of water, but we lost three months of the valuable water supply down there because of the confiscation of the original shipment of gasoline. The scarcity of water was caused by the dry season coming on. I have heard of the El Porvenir Mining Company of Honduras, a corporation, and know when it was organized. [91]

JUAN C. CHARLES

one of the plaintiffs, called and sworn as a witness for plaintiffs, testified as follows:

Direct Examination

Prior to September 1, 1937, I was associated with Mr. Nester in a partnership in Honduras. On September 1, 1937, I was at the El Porvenir mine, Republic of Honduras, Central America. I did not on October 15, 1937, receive from Paul Nester through The Western Union Telegraph Company $150. I have never received that money. On September 13, 1937, or thereabouts, I communicated with Mr. Nester about this $150.

The gasoline in that shipment that was sent by Mr. Nester was confiscated by the Honduranan government. In my opinion the money value of the shipment, comprising the 50 cases of gasoline and the other property that was confiscated was around between $500 and $550.

I have among my papers a lease. It is the instrument under which we were holding the El Porvenir mine.

The lease referred to by the witness was then offered and received in evidence as Plaintiff's Exhibit 7, together with an English translation thereof, such lease being in the Spanish language. The English translation of such exhibit is as follows:

(Testimony of Juan C. Charles.)

"CONTRACT OF SALE OF THE MINERAL ZONE 'EL PORVENIR'

"In the city of Tegucigalpa, 23 day of month of March, 1937, before me, Luis A. Jimenez, Lawyer & Notary Public of the above abode, appear Mr. Pastor Gomez, Jr., Physician & Surgeon, of this place & Mr. John Cartheche Charles, American citizen, miner, with residence in this [92] city; both parties married and of legal age; Mr. Gomez acting in his capacity of general manager of the Porvenir Mining Company authorized the Saturday 14th of November of 1936, before the Notary & Lawyer, Mr. Ricardo Pineda, which decument I, the Notary testify to have seen and to be sufficient to qualify Gomez to act in that capacity & the latter (Charles) to act in his own name, who assure me that they enjoy their civil rights, declare: "First: Mr. Gomez: That the Porvenir Mining Company which he represents, according to No. 444 of Secretary of State in the Department of Interior (Despachos de Fomento), Public Works, Agriculture & Labor of the 26th of October of the past year, the Executive Power, previous denouncement and the procedure of law, conceded to him, the Mineral Zone known as the Porvenir that produces Gold & Silver, of 200 hectares, 68 areas & 77 centiares (area = square decameter) situated in the jurisdiction of Aramecina & Curaren, in the Departments of

(Testimony of Juan C. Charles.)

Valle & Tegucigalpa respectively; mineral zone which will be found inscribed in the Department of Secretary of State before mentioned, bearing the No. 2, folio 2, of the respective register of that office; bounded on the north by a straight line running between the apex of the western point of the large mount in 'En Escalon' the apex of Mount Guanacaste; on the south by the river 'Apasapa'; on the east by a straight line running on the top of Mount Guanacaste passing by the north of the abandoned house of Senor Marcelo Maldanado Padilla, to [93] river 'Apasapa', and on the west by a straight line that leaving the summit of the 'Escalon' passes thru the middle of the eastern slope of Mt. 'Pelota', by the place named the 'Aguacate', and by the apex of the Mt. 'Higueral', ending at the 'Apasapa' river. That in the mentioned zone, are found the openings of workings named 'The Porvenir', the 'Manto', 'La Gloria', 'El Ocote', 'El Limon' & 'El Quebracho', these being the principal ones. Second: The same Mr. Gomez, Jr., having agreed with Mr. Charles the transference (Enajenacion) of the mineral zone 'Porvenir' they celebrate under the following stipulations the contract of sale of the described mineral zone.

"Stipulations:

"A.—Mr. John C. Charles obliges himself as soon as possible after the delivery of the mine

(Testimony of Juan C. Charles.)

to him to install a modern mill with capacity to work 25 tons of ore every 24 hours, being agreed and so contracted between both the contracting parties that after consumating this contract & while carried to the point of installation of the mill, neither of the parties can withdraw ore from the described mineral zone.

"B.—The same party (Charles) obliges himself to pay to Mr. Gomez, Jr., as representative of the 'Porvenir Mining Company' or to the Banking Institute of this city, the sum of Limperas 180,000 from the production of the zone; to pay for the amortization of this sum 25% of the net returns from the mill or the exportation of ore extracted from the same mineral zone until the sum of [94] Limperas 180,000 has been payed, this sum being agreed between the contracting parties as the price of the mineral zone 'Porvenir'. With this knowledge & thus agreed that 25% of the net return shall be payed towards the purchase price of Limperas 180,000, the payment shall commence 30 days after the mill beings operation.

"C.—It is understood that what is meant by net returns, is what remains after discounting from the gross amount all the costs relating to the production including the cost of exploitation, the milling of the ore, freight costs, all commissions for selling of the product, production taxes, indirect as well as direct that might

(Testimony of Juan C. Charles.)

be decreed by the state and any other cost that might be occasioned by the business.

"D.—After having completed the payment of the Limperas 180,000 as price of the 'Porvenir' mineral zone, he is obliged further more to pay (cedar) during the exploitation of the named mineral zone, 8% of the NET RETURNS of the mine.

"E.—Mr. Gomez, Jr., is obliged to deliver to Mr. John C. Charles or his representative in this city for each payment that he shall make of the 25% before stipulated, a receipt, duly required, that is to say, on legal paper and the stamps required by law, the entailed cost of these being sustained by Mr. Gomez.

"F.—In all fortuitous events or acts of God, shown as such, that may suspend or impede the exploitation of the 'Porvenir' Mineral Zone, the terms set forth in this contract provide automatically for a term equel in time [95] for that which causes the suspencion of impeachment.

"G.—With the consent of Mr. Gomez as representative of the 'Porvenir' mining company Mr. Charles can in case he believes convenient to abstain personally from exploiting the 'Porvenir' he may transfer to another person the rights which this contract confer upon him; he being obliged (Mr. Charles) to notify his intention of transferring the right at least 30 days in advance of the date on which he intends to

(Testimony of Juan C. Charles.)

celebrate the contract of transfer. The person to whom he transfers this contract will take over all the rights and obligations of this contract.

"H.—Mr. Gomez in the name of and representation of the 'Porvenir Mining Company', makes formal transfer of the 'Porvenir' mineral zone along with the titles of ownership of the Sellers to Mr. Charles once Mr. Charles may have completed the payment of Limperas 180,000 stated as the price of the Porvenir Mineral Zone, and will give him a bill of sale.

"I.—Any difference that may come up between the contracting parties relative to the interpretation or completion of this contract and which may not have been settled by 15 days after arising, shall be submitted to arbitration in the form indicated in the following manner. First, Either of the parties shall notify the other that he wishes the case arbitrated; the notification in the residence of the contracting parties, and the party notified is obliged to designate his arbiter within 15 days of the date the notification is [96] made; the party that notifies at the same time can make known his arbiter. Second, The third person to arbitrate shall be designated by the first two; in case they cannot decide upon one, then by the Judge of the Civil Court of the Department. Third, For the substanciation of the Judicial arbitration refer to

(Testimony of Juan C. Charles.)

the 1st obliged proceedings of the Civil Code (Title XX). Fourth, There shall be a competant Judge to execute the findings of the umpires.

"J.—If there should be cause of annulment of this contract, moreover of those which the civil code might decree, that Mr. John C. Charles does not have to make the payment of the amount agreed on in the form and dates stipulated within a term of grace of 30 days given him by Mr. Gomez in his representative capacity.

"K.—Mr. Gomez in the name & representation of the 'Porvenir Mining Company' shall have the right to name an inspector that will be charged to watch and examine the work & instalations & books of Porvenir mineral zone; it being understood that the cost of the salary of said inspector shall be carried by Mr. Gomez.

"L.—Mr. Charles is obliged to pay for next year & hensforth in the General Tresury of the Roads, the fee corresponding to the Porvenir mineral zone, the same that the municipal taxes and whatever other taxes that are decreed by our laws.

"M.—Mr. Charles or his legal representative can at any time, remove, take away or transfer the mill, machinery, pumps, turbines transformers, motors & any other implements of

(Testimony of Juan C. Charles.)

machinery that may have been in- [97] stalled on or in the Porvenir Mining Zone.

"N.—La Agencia Nacional S. A. of Amapala, represented by Mr. Hector Leiva, will be charged as agent in that city to receive the machinery, materials, etc., that come consigned to Mr. Charles or the 'Porvenir' & transport them to the Port of Acetuno; And the same for the exportation of the products of the mine.

"Third: Both contracting parties accept entirely the stipulations given in the present contract of Sale. Theirs they say, and thus they consent, etc.

"(signed)

PASTOR GOMEZ HIJO

"(signed)

JOHN CARTHECHE CHARLES" [98]

In my opinion that property, or that lease, was worth $250,000 United States currency. I am familiar with the properties and mine covered by this lease. I made the first discovery on that property about 34 years ago.

Cross Examination

My first knowledge that the shipment that left Los Angeles on the 'Coya' on August 2, 1937, had arrived at Amapala was when I was notified by Agencia Nacional. A letter was sent to me by Mr. Leiva, one of the head officials at Amapala. That letter was sent to me about four or five days after

(Testimony of Juan C. Charles.)

the arrival of the cargo and was received by me about four days after that date. If the tides come in through the Gulf of Fonseca and if the mail man is at the place of debarkation of the mail, the mail gets to the mine from Amapala in probably three to four days. Other times it takes a little longer. The mail goes to Guascoran, another village, and to another little village called Langue. The mail arrives twice a week. The nearest point to the mine where the mail is taken out and delivered is the village of Aramecina, but I have my own mail runner that goes from the mine down to the town each time the time is set for the mail to arrive and depart. A good runner makes that trip in two hours and twenty minutes or two hours and a half. Supposing that the cargo got in around the 15th, it would take to around the 19th for me to have received a letter.

By the letter to which I have referred, the firm notified me that the charges on this consignment of gasoline must be paid at once, as soon as possible, and I was naturally awaiting this money from my associate to cover those charges. If I remember rightly, the government after the cargo gets in allows eight days. From that time on they charge you two cents per kilo every 24 hours. [99] In our case that figured up to 36 Lempira every 24 hours. When I got that notification I could do nothing. I didn't have that money. It had not arrived by wire. There are no cables there. Aramecina is nothing but an Indian village. To cable to my associate I would

(Testimony of Juan C. Charles.)

have had to send the wire to Tegucigalpa, and then from there up to the United States. It didn't occur to me to inquire by telegraph of my associate what had become of this money for I had sent him two air mail letters meanwhile. On August 1, 1937, I had sent him two air mail letters before I sent him the letter of September 13, 1937.

I received the letter from Agencia Nacional on August 19, 1937. After receiving that letter from Mr. Leiva I immediately, around August 20th or 21st, 1937, sent my associate an air mail letter. Twice I endeavored to cable my associate and each time the native operator on the Federal wire out of Aramecina refused to take the cable. He said he could not take the cable unless he got a clearance from the Administrator of the Federal Telegraph at Tegucigalpa. Then when I was so informed I took my mule and rode down to Aramecina, and he, while I was waiting there, sent a wire off to Tegucigalpa, taking the number of words contained in my cable, and asked permission to send it. The Administrator notified him to tell me that it had to be in the language of the country and that the message could not be sent for 48 hours from the time I presented it. When I was informed of this fact, I knew that Mr. Nester would by that time have received those air mail letters that I had already sent.

The 36 Lempira per day to which I referred was for storage charges. A Lempira is 50¢.

There was no place in Honduras where I could have bought gasoline. [100]

J. W. INWOOD

called and sworn as a witness for Plaintiffs under Federal Rule of Civil Procedure 43, testified as follows:

Direct Examination

The following telegram, dated September 27, 1937, was prepared in my office and addressed to New York:

> "Svc salutt desk two Nyk Ysd re our 1 Charles Aramecina (Honduras) order apparently fwded wrong country as Aramecina located Honduras not British Honduras. Sndr clms no bank Aramecina. Most probable closest bank Tegucigalpa Honduras Error rendering country British Honduras ours Can you ascertain present status order and if being held Belize have bank there fwd by wire to Tegucigalpa who will mail draft to Aramecina. Sndr also asks we have bank Tegucigalpa wire payee direct that money mailed."

"NYK" means New York." "YSD" means "your service date."

About September 28, 1937, I received the following telegraph from New York:

> "September 1, Charles, Aramecina Honduras Error misrouting chargeable this office. Have cabled agents Belize forward by wire to Honduras."

"SAP" means "as soon as possible." On the telegram last referred to are pencil notations reading:

(Testimony of J. W. Inwood.)

"Call counter 10-4-37." I take it Mr. Nester called at the counter, and it says "Further report." I presume this means to notify sender at the address here, 18125 Malibu Road, Pacific Palisades.

On October 7, 1937, I received the following wire from New York. [101]

> "Ne 27 svc Inwood Los Angeles October 7, 1937 8:25 A. M. Naval September 1 Charles Aramecina Honduras was forwarded to Honduras September 28 have just received cable saying payee notified but delivery of funds not yet effected am having foreign connections traced will advise sap."

The letter (referring to a letter dated June 21, 1938, shown the witness) does not bear my personal signature, but that is my name and my office wrote that letter under my supervision. I was the chief of the office. I am responsible for all those men that dictate letters and send them out over my signature.

The following exhibit, being the letter referred to by the witness, was then offered and received in evidence as

(Testimony of J. W. Inwood.)

PLAINTIFFS' EXHIBIT 8.

"The Western Union Telegraph Company
"Los Angeles, Cal.

"June 21, 1938
"File 103-C-J

(Stamped)
"Received
Jun 23 1938

"Mr. August J. O'Connor,
"Attorney at Law,
"639 South Spring St.,
"Los Angeles, Calif.

"Dear Mr. O'Connor:

"Thank you for your letter dated June 9 in connection with the cable money order for $150.00 deposited with us by your client, Mr. Paul Nester, on September 1, 1937, and drawn payable to Mr. Juan C. Charles at Aramecina, Honduras, about which you recently conferred [102] with Mr. Wilkes of my office.

"It is true that, as the result of an unfortunate irregularity in our service, the money order was first released with the destination shown British Honduras while, as you know, it was intended for Aramecina, Honduras in Central America. However, the irregularity was later detected, the remittance having been released for payment at the designated foreign destination.

(Testimony of J. W. Inwood.)

"I have since learned that the handling of the money order was made the subject of an investigation during October of 1937. At that time the foreign administration submitted a report indicating that the paying agents at Tegucigalpa, Honduras, had notified the payee when the funds had been received. It was also pointed out at that time that the payee had been given an explanation of the delayed receipt of the funds. The foreign connections also volunteered the information that when the order was sent Mr. Charles actually resided about twelve kilometers from Arameeina and that he often followed the practice of sending a messenger to that place to pick up mail and other communications. In the previous report it is declared that the money order was ultimately paid on October 13, 1937.

"In view of the contention of Mr. Charles that he has not personally received the money order it seems not unreasonable that some misunderstanding exists. I have, therefore, called upon our people in New York to take necessary steps to have the remittance returned for refunding to your client in the event it develops the amount is being held unpaid at the destination point or otherwise to let us have definite proof of payment. You may be assured [103] that everything possible will be done to develop the true particulars and just as soon as a

(Testimony of J. W. Inwood.)

report has been received from the foreign administration I shall be very glad to again write you in the connection.

"Very truly yours,
(Signed) "J. M. INWOOD
Superintendent."

Cross Examination

This telegram (referring to a telegram shown the witness) was received at my office.

The telegram thus identified by the witness was then offered in evidence. Whereupon the following occurred:

"Mr. O'Connor: To which we would object, your Honor, as hearsay as to these plaintiffs and not binding upon them.

"Mr. Waters: It merely goes to the point of their stating it was negligence on our part in notifying them that the money was delivered, and that at least shows that we were acting in good faith when we advised them that the money had been delivered to Mr. Charles.

"The Court. As bearing on good faith only, and not on the fact, it will be received.

"Mr. Waters: We offer it for what it is worth.

"The Clerk: Defendants' Exhibit A.

"The Court: Defendants' Exhibit A."

The following is a copy of

(Testimony of J. W. Inwood.)

DEFENDANTS' EXHIBIT A:

"ND 192 SVC—Inwood 8 Los A

1937 Oct 13 AM 8 37

"Naval Sept 1 Charles Armecina Honduras Agents Adv Payee Took Dly of Funds Today. "Salutt Desk 2 NYK 13." [104]

The following exhibit was then offered and received in evidence without objection as

PLAINTIFFS' EXHIBIT 9:

"The Western Union Telegraph Company
"Los Angeles, Cal.

"J. W. Inwood "July 6, 1938.
"Superintendent File 103-C-J (Stamped)
"Received
"July 8, 1938

"Mr. August J. O'Connors,
"Attorney at Law,
"639 South Spring St.,
"Los Angeles, Calif.

"Dear Mr. O'Connor:

"Please refer to our previous correspondence in connection with the cable money order for $150.00 deposited with us by your client, Mr. Paul Nester, on September 1, 1937, and drawn payable to Mr. Juan C. Charles at Aramecina, Honduras.

(Testimony of J. W. Inwood.)

"We have now learned from our paying agents in Honduras that the payee refused to accept the funds because of the delay. In the circumstances I am enclosing our check in refund of the principal of the order, as well as our check in refund of the charges. Permit me also to express my exceeding regret for the conflicting report rendered to us by our paying agents that the funds actually had reached Mr. Charles.

"Very truly yours,

(Signed) "J. W. INWOOD,

Superintendent." [105]

The plaintiffs then rested.

The defendants then moved for a dismissal of the cause upon the following grounds:

"..... that the plaintiff has failed to sustain the allegations in the complaint; that there has been no showing of any negligence on the part of this defendant; and that there has been no showing, nor has it been pleaded, that the damages alleged in the complaint were within the contemplation of the parties; and that the only damages that could be awarded in a case of this kind would be the amount of money involved and detained, plus interest from the date of its detention until the date of its tender back. The money was tendered back some time ago. Coun-

sel still has the amount, so it would just cover interest from the 1st of September to the date of the check.

"And in regard to the stipulations in the contract as to the limitation of liability and the non-liability for negligence on the part of its connecting carriers, are valid and subsisting contract provisions; and that to hold differently would contravene the Commerce Act, United States Constitution, Article I, section 8, subdivision 3, and the acts of Congress passed in pursuance thereof, particularly the act of June 18, 1910 (Statutes at large 539), acts supplemental thereto, and any amendment thereof, and the Communications Act of 1934, approved June 19, 1934."

After argument, this motion to dismiss was denied by the Court. [106]

EMERY E. VARGA,

Consul of the Republic of Honduras, appeared and produced, responsive to subpoena, from the archives of the consulate, a volume of the statutes of that Republic. Counsel for plaintiffs stipulated that this was an official document. Called and sworn, this witness testified as follows:

Examination by Plaintiffs' Counsel

I am Consul of the Republic of Honduras, but did not hold that official position in 1937. I have not been admitted to practice law under the laws of

(Testimony of Emery E. Varga.)

Honduras. I am not familiar with any of the laws pertaining to tariffs and duties of Honduras outside of those contained in this volume. I have received no official notification that this document has been amended or altered or changed by the Congress of Honduras. On the basis of this document I am instructed to advise persons who intend to ship to Honduras.

A copy of certain sections of the statutes contained in the volume thus produced (such copy being stipulated by plaintiffs' counsel to be a correct copy) was then offered and received in evidence as defendants' Exhibit B. The same being in the Spanish language, the following English translation thereof (stipulated by plaintiffs' counsel to be a substantially correct translation) was then offered and received in evidence as

DEFENDANTS' EXHIBIT C:

"Republic of Honduras

"Ministry of the Treasury and Public Credit

"Customshouse Tariff

"1934

"Calderón Printing Shop

"Tegucigalpa, Honduras, Central America,

"Number 77 Cervantes Avenue. [107]

"Rules for the Deposit, Registration and Appraisement of Merchandise.

"Deposit and Storage

"Article No. 4—All goods shall be deposited in the national warehouses. This deposit shall

(Testimony of Emery E. Varga.)

be requested by means of a detailed Customs-house Manifest with the same data as on the Consular Invoice.

"The duration of the deposit in government warehouses, for goods not included in articles 7th and 8th, may be extended up to one year, which may be in turn prolonged another year. All extensions of time shall be granted if payment is made for the time already elapsed.

"Article No. 7—The following merchandise shall not go into the national warehouses, and shall be entitled to only six days of free deposit on sites within the jurisdiction of the Customs-house:

"Fertilizers

"Olives in wooden containers

"Industrial acids, and corrosive or inflammable substances

"Essence of turpentine (aguarris)

"Barbed wire

"Alcohol in any type of container

"Tar (pitch)

"Live animals

"Naval instruments other than scientific

"Passenger automobiles

"Buses and trucks

"Mercury

"Sugar in sacks [108]

"Sulphur

(Testimony of Emery E. Varga.)

"Large platform weighing scales and portables

"Pitch (tar) or turpentine in barrels

"Empty Barrels and 60-gallon barrels, assembled or unassembled

"Ship, fire and gasoline station pumps

"Iron safes

"All types of piping

"Calcium carbide

"Loaded fire-arm shells

"Meats in sacks, excepting preserved meats

"Dyeing or tanning barks

"Chimneys and boilers

"Railroad freight and passenger hand cars

"Cement in barrels or sacks

"Brooms

"Sulphuric ether

"Iron, steel and other common metals in the rough

"Phosphorus matches

"Fresh fruits

"Explosives

"Galvanized sheet iron

"Fresh vegetables

"All types of industrial machinery, excepting hand or pedal operated.

"Building materials and those used for industrial purposes

"Goods in bulk, as lumber, coal, bricks, blocks, etc.

(Testimony of Emery E. Varga.)

"Dry pastures
"Live plants [109]
"Rails and railroad ties
"Table sale and rock sale
"Caustic sodium
"Sodium sulphite
"Liquid carbon sulphite
"Tractors
"Chalk in barrels
"Tubers
"All rough merchandise and heavy freight goods
"All articles subject to waste and damage due to cartage and storage, or which because of other circumstances can be handled on the beach, as per judgment of the head of the Customshouse.
"National or nationalized coasting trade freight.

"Two centavos shall be charged daily for each kilogram of merchandise after the fixed period of time has elapsed, to cover the expense of safe-keeping the articles under the custody of the state shall not exceed the period of six days on the following goods:

"Live animals
"Sugar
"Meat in sacks, excepting ham and bacon
"Fresh fruits
"Fresh vegetables

(Testimony of Emery E. Varga.)

"Live plants

"Table and rock salt

and fifteen days on all others.

"Article No. 9—The cargo referred to in Article 7th and 8th, shall be considered as of compulsory shipment, and its custody or reshipment must be applied for within [110] the time and conditions established for deposits.

"Public Auction* Sales.

*(The word "Auction" is inserted in pencil.)

"Article No. 41—The merchandise shall become the property of the State, and will be sold in public auction, whenever its custody, deposit or reshipment are not requested as prescribed by the law—or whenever they are expressly abandoned by their owner.

"In order to enforce this Article in case the commodities have been abandoned, it is not necessary that the time fixed for the deposit has elapsed. It will suffice with the written declaration of the owner or the consignee, accompanied by the Bill of Lading and the Certificate of Deposit." [111]

THELMA J. IVIE,

called and sworn as a witness for defendants, testified as follows:

Direct Examination

On September 1, 1937, I was employed by defendant, The Western Union Telegraph Company, as sales clerk. My title really was "money order clerk" but I also worked in the sales, helping out when they were busy, so it was part sales. I accepted a money order from Paul Nester on September 1, 1937. Plaintiffs' Exhibit 1 is the application that I wrote out for Mr. Nester. I wrote the name, the address, and he signed it. When I handed it to him to sign, the word "British" was on there. I also made out the receipt which is Plaintiffs' Exhibit 2. Eliminating the stamp and the written portion, that is in my handwriting. I wrote the name "Juan C. Charles" and "Aramecina (Honduras". With reference to the fact that "Honduras" is written on the receipt and "British Honduras" appears on the application, I have this to say. On that day I was working at the money order desk and they were busy at the counter and I was called to the counter. Naturally, I was in a hurry because I had other things on my mind. The money order desk is where we wrote the messages to be translated on the wire. So the only thing I can say, I was just in a hurry and the main thing was to get his name in there because I accepted the money from him. I did not look up Aramecina or ask him for information con-

(Testimony of Thelma J. Ivie.)

cerning it when he came in. I accepted it just as he dictated it to me. I wrote it down on the blank. The word "British" I received from him, and put it down and returned the application to him to sign.

Cross Examination

Possibly in my school days I used the words "British [112] Honduras" but I had not used them recently until the time I accepted that money order. I didn't at that time know where British Honduras was. Before that, I may have taken in some foreign money orders. I don't remember. I did not know where Honduras was at that time. I wrote the figures on that money order. When he gave me the place, I looked on a card which gave us the rate. The card had on it "British Honduras" and the charge for each word. I looked up the charge. When I looked for the rate I knew that I was looking up rates for foreign money orders. When he dictated "British Honduras" to me, as I have testified, I did not know where British Honduras was. I did not send the telegram. I am not an operator. I simply turned it over to the operator to send. I did not tell Mr. Nester that I did not know where British Honduras was. When I wrote out the receipt for the money "British Honduras" was not the only thing I had in my mind. I had the whole thing in my mind. I had never seen the man before. I did not know who it was going to until he dictated it, so, naturally, I couldn't have just had that one thing in mind. No appreciable time elapsed between the

(Testimony of Thelma J. Ivie.)

time that he dictated this application in which he said "British Honduras" and the time when I made out this receipt for the $150. I wrote the receipt almost immediately after I wrote the application. When I made out the receipt I made it out from the application. I saw the words "British Honduras" on the application. The reason that I didn't put the word "British" on the receipt was this. I looked at the application and wrote out the receipt. I did not write it just word by word because the main thing was to get Mr. Nester's full name, as I had accepted the money from him, and it was not important that I get all of the address and everything on the receipt. [113]

In my deposition previously taken I testified as follows:

"Q—Will you explain to me why you didn't put in British on that?

"A—Only thing I can explain on that is that I was in a hurry and evidently forgot to put in all of it.

"Q—You saw it on the application, didn't you? "A—Yes, sir.

"Q—You made the receipt from the application? "A—Yes, sir.

"Q—And that is your explanation, is it?

"A—Yes, sir."

The truth is that I forgot to put the word "British" in there. I was in a hurry.

(Testimony of Thelma J. Ivie.)

In my deposition previously taken I testified as follows:

"Q—And that was your only acquaintance with that name, was British Honduras, is that right? "A—Yes, sir.

"Q—And that was the first time you had ever heard it?

"A—Yes, it was, because I wasn't accustomed to handling cables. In the middle west we do not have cables. Once in six months that we ever had a cable.

"Q—I am just asking you a simple question.

"A—I have answered it.

"Q—That is the first time you ever heard the name of that country, British Honduras? [114]

"A—As far as I remember, yes, sir.

"Q—How much schooling did you have?

"A—High school education."

I graduated from high school. At the time I took the money order in I was employed in the capacity of money order clerk. When I first went to the company, I went on the counter as a sales clerk. Then, on July 15, 1937, I believe, I was transferred to the money order desk. A sales clerk accepts money orders at the counter from the customers. A money order clerk is at a desk back of the counter where we write the messages up to set to the wire before they are transmitted. That is handling money orders entirely. The sales girl or clerk takes the

(Testimony of Thelma J. Ivie.)

order at the counter where the customer writes out his messages and hands them in. Then the messages are turned over to the money order clerk. The money order clerk composes the telegram. At the time I took this application I was working at the money order desk, but the counter was busy so they called me to the counter to take care of the money order and I took in the money order.

I have been with the Western Union 14 years next March. In my deposition previously taken I testified as follows:

"Q—What was your connection with this Western Union Telegraph Company?

"A—Sales clerk.

"Q—Sales clerk? "A—Yes, sir.

"Q—That was September 1st, 1937?

"A—Yes, sir."

You had me confused. I didn't know what I was saying. That is my explanation now. I am not confused this morning. The fact is that on September 1, 1937, I was a money order clerk and not a [115] sales clerk as stated in my deposition.

Between March, 1937, and September 1, 1937, I had taken some foreign money orders. I don't remember just how many. There may have been a few, but I don't remember. I might have taken several, and I might have only taken two or three. I never accepted money orders for the company before I came to the company's Los Angeles office

(Testimony of Thelma J. Ivie.)

in June, 1937. In my deposition previously taken, I testified as follows:

"Q—Between June, 1937 and September 1st of 1937 about how many applications for money orders have you taken, do you know?

"A—No, I couldn't answer that because when I first went on the counter you are not allowed to handle money orders at first, so it would be impossible to say how many.

"Q—Even approximately?

"A—No, sir.

"Q—You have no idea? "A—No, sir.

"Q—You wouldn't venture an estimation?

"A—No, sir.

"Q—Even if you took time to reconsider it a little?

"A—No, sir, it would be impossible.

"Q—Would you say it would be a substantial amount?

"A—That I couldn't say.

"Q—Would you say it was negligible, one or two?

"A—I couldn't say just how many it would be.

"Q—Would you say one or two? [116]

"A—I wouldn't say one or two, but it is impossible to say how many orders you handle.

"Q—Your recollection and memory is highly material in this case and I want you to make an

(Testimony of Thelma J. Ivie.)

honest effort to recall whether that number was one or two or more.

"A—I would say that I handled two money orders.

"Q—Very well.

"A—However, I have to make a further statement that those were foreign and not domestic."

* * * * * * *

"Q—Those were domestic?

"A—No, these two were foreign. I have handled numerous domestic money orders."

After I came to the Los Angeles office I did handle money orders but most of them were domestic. I couldn't say that I only handled two foreign money orders. It may have been only one, or it may have been more. I can't remember. There is a likelihood that I handled two foreign money orders.

On that occasion when Mr. Nester came in, another clerk had been talking to him and called me over. I did not overhear the conversation between Mr. Nester and that clerk. The clerk told me that she had two customers and asked me to come over and wait on one of them. She did not tell me what the customer wanted. I don't exactly recall what her conversation was, except that she wanted me to wait on one of the customers. I recall definitely that another clerk had talked to Mr. Nester before I came on the scene. In my deposition previously taken I testified as follows:

(Testimony of Thelma J. Ivie.)

"Q. So she hadn't waited on Mr. Nester, she [117] pointed out he was at the counter and told you to go to——

"A. Not to my knowledge, sir.

"Q. Was she in fact waiting on Mr. Nester?

"A. That I couldn't say. I was busy at the time and she called me over.

"Q. I just want to get what your recollection is, my dear, I wasn't there, Mr. Camack wasn't there. We are trying to find out how you remember that occasion.

"A. I remember that I didn't know whether the lady had already talked to him or not when I wasn't even over at that end of the counter. I cannot say whether she carried on a conversation with him or not." That is the fact.

Redirect Examination

In my deposition previously taken I testified as follows:

"Q. Why didn't you put it on his receipt?

"A. As I said before, I was in a hurry and I cannot say positively, you do not look at the whole thing when you fill out a receipt. I remember looking at the name to then just write it off.

"Q. That is your explanation?

"A. Yes, sir."

(Testimony of Thelma J. Ivie.)

Recross Examination

In my deposition previously taken I testified as follows:

"Q. Although you didn't know that there was any other country by the name of Honduras? [118]

"I didn't know where Honduras was. I didn't know there were countries at the time.

"Q. And you didn't know whether there was an Aramecina? A. No, sir.

"Q. And you didn't know whether that was correct, the name Aramecina?

"A. No, I just took it and Mr. Nester's word.

"Q. And he told you, according to your testimony, that it was British Honduras, did he not? A. Yes, sir.

"Q. And that was your only acquaintance with that name was British Honduras, is that right? A. Yes, sir.

"Q. That was the first time you had ever heard it?

"A. Yes, it was, because I wasn't accustomed to handling cables. In the middle west we do not have cables. Once in six months that we ever had a cable." [119]

J. C. MASON

called and sworn as a witness for defendants, testified as follows:

Direct Examination

I am office manager for The Western Union Telegraph Company at 608 South Spring Street, Los Angeles. That is the main office. We have forty branches in the city under that office. I have been assistant superintendent at that main office about 15 years. I have supervision over the clerks, especially at the desk and the money order department and the message department. I select the clerks and see that they are trained, and have general supervision over them.

I have known Mrs. Ivie, who was just on the witness stand, since March, 1937. I put her to work in the Los Angeles main office. About March 15, 1937, she was employed as a sales clerk, working on the counter in the main office. She continued as sales clerk until about the middle of July, when she took on the added duties of money order clerk. That was at my direction. I have observed her work continuously from the time she came here in March until the present time. She had handled very few foreign money orders. In fact, we handle very few foreign money orders at the main office.

I have general knowledge of the lines and operations of The Western Union Telegraph Company. That company did not, on September 1, 1937, and does not now have any lines whatever of its own

(Testimony of J. C. Mason.)

extending into the Republic of Honduras, and does not operate any offices of its own in Honduras. The company does not operate in any way or have any employees in the Republic of Honduras. A money order filed in Los Angeles destined for Honduras would be sent by us to our office in New York. In New York we would turn it over to the American Express Company and the [120] latter would cable it to some bank in the Republic of Honduras over some other connecting cable line. It normally would go by the All-American Cable Company and be paid to a bank there.

Cross Examination

If a money order was taken on September 1, 1937, at our Los Angeles office, directed to a payee at Arameeina, Honduras, that wire should get to Honduras about September 2, 1937. I would not know that it would get to Arameeina, Honduras. Money orders generally in foreign countries have to be mailed if they are in small communities; and I would have no way of knowing just what would be the delay in Honduras. It would get somewhere in Honduras about that time. [121]

PAUL NESTER

one of the plaintiffs, called as a witness for defendants under Federal Rule of Civil Procedure 43, having been previously sworn, testified as follows:

(Testimony of Paul Nester.)

Direct Examination

Referring to Plaintiffs' Exhibit 5, the first item shown is "1 Piece Ore Car". To the best of my recollection I paid $87 or $89 for that here in Los Angeles. For the "2 Sacks Blacksmith coal" I paid around $2.50. I don't recall what I paid for the "1 Bale Wire screen for mill". I have purchased several bales of wire screen and they have been different amounts. For the "50 cases Gasoline in tins" I paid, I believe, $110. I don't think that included the oil shipment. For the "2 cases lubricating oil" I paid $20 or $25. For the "1 case battery radio receiving set complete" I paid approximately $40. I prepaid the freight on that shipment. The exhibit shows the freight charge to be $52.48. Evidently that is correct. I paid the consular fee amounting to 5% of the value of the entire shipment plus the handling charge of the brokerage company which shipped it. I paid Robert E. Tracy & Company, export shippers, Los Angeles, a total bill of $79.23. That included consular fees, the commercial invoices, the blanks for marine insurance and export declaration and services and charges, including freight charges. No other charges were paid here on that freight shipment. The export duties at Aramecina on gasoline would run $1.25 per case, which amounted to $62.50. The values on the left-hand margin of this exhibit (Plaintiffs' Exhibit 5) represent the prices paid for these goods. [121a]

JUAN C. CHARLES

one of the plaintiffs, called as a witness for defendants under Federal Rule of Civil Procedure 43, having been previously sworn, testified as follows:

On Examination by the Court

I received notice from Amapala of the arrival of the freight about eight days after the cargo had arrived at the port of Amapala. The cargo arrived at the port of Amapala, so far as I know, on August 15th or 16th, 1937.

Direct Examination

I am one of the incorporators of the El Porvenir Mining Company of Honduras. Mr. Nester is interested in that company. That corporation was formed about July 8, 1938. In those proceedings I was named as president and am still the president. That corporation did not necessarily have to do with the same mine that we have been talking about. That company was formed with the intention of taking some other properties belonging to the vice president of the Republic of Honduras. However, it included the mine we have been talking about and various properties.

There was then offered and received in evidence as Defendants' Exhibit D, a form of "Western Union Money Order," both the face and reverse side of such form being identical to the face and reverse side of the Western Union Money Order form which was signed by plaintiff, Paul Nester, on

(Testimony of Juan C. Charles.)

September 1, 1937, and which appears herein as Plaintiffs' Exhibit 1. However, the form, which is

DEFENDANTS' EXHIBIT D,

has stamped upon the face thereof the following, with the impression of a seal:

"Interstate Commerce Commission
"Received
"Mar 9 1932
8119
"Section of Tariffs" [122]

and has annexed thereto the following certificate:

"United States of America
"Federal Communications Commission
"Washington, D. C., October 14, 1938.

"I hereby certify that the attached is a true copy of Western Union Money Order Form 72-H which was filed with the Interstate Commerce Commission on March 9, 1932, and which was ordered transferred to the Federal Communications Commission under the provisions of Section 603 (b) of the Communications Act of 1934, and that said Money Order Form 72-H was, on September 1, 1937, and still is on file with the Federal Communications Commission, and that I am the proper custodian of the same.

"In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal

(Testimony of Juan C. Charles.)

Communications Commission to be affixed, this fourteenth day of October, 1938.

(Signed) "T. J. SLAURE,

"Secretary."

(Seal impression of the Federal Communications Commission, affixing ribbon attaching documents.)

[123]

The defendants then rested.

"The Court: Any rebuttal, Mr. O'Connor?

"Mr. O'Connor: Merely this: If I put on Mr. Nester, your Honor, he has testified that—he will testify that he did not dictate 'British Honduras.'

"The Court: He has already so testified on direct.

"Mr. O'Connor: He tesfified that when he signed it, your Honor, it did not have the word 'British' on it. It might have the same effect, but Mrs. Ivie testified——

"The Court: You may put him on, but I thought he stated specifically that he did not put 'British Honduras' on it.

"Mr. Waters: We will stipulate that he would so testify.

"Mr. O'Connor: That is all I wanted, and we will close it up." [124]

JUAN C. CHARLES

recalled as a witness, testified as follows:

On Examination by the Court

I went down to Amapala about September 14, 1937. Up to that time I did not go there at all. I wrote several letters asking our agent at Amapala if he would not please intercede for us with the Administrator of the Customs. I had a written statement from the authorities telling me that the goods were confiscated as of a particular date for non-payment of charges. I have that statement in a box at the mine El Porvenir in Honduras. I don't have any record here showing the date upon which the confiscation took place. I was not present at any auction held by the government for the sale of this cargo. I was not supposed to be there. Our agent represented us and notified me.

The cause was then submitted. [125]

EDWIN CAMACK,
F. A. WATERS,
PILLSBURY, MADISON & SUTRO, and LAWLER, FELIX & HALL,
By JOHN M. HALL,
Attorneys for defendant and appellant, The Western Union Telegraph Company.

It is hereby stipulated that the foregoing condensed statement, which incorporates therein all

exhibits received in evidence, is a true and complete record and statement of all the evidence and proceedings in the above entitled action, and that the same may be approved, settled and allowed by the Judge without notice.

Dated: January 27, 1939.

AUGUST J. O'CONNOR,
By GEORGE J. HIDER,
Attorney for plaintiffs and respondents.
EDWIN CAMACK,
F. A. WATERS,
PILLSBURY, MADISON & SUTRO, and LAWLER, FELIX & HALL,
By JOHN M. HALL,
Attorneys for defendant and appellant, The Western Union Telegraph Company.

The foregoing condensed statement, which incorporates therein all exhibits received in evidence, is in all respects hereby approved, settled and allowed as a true and complete record and statement of all the evidence and proceedings in the above entitled action.

Dated: January 30, 1939.

LEON R. YANKWICH,
Judge.

[Endorsed]: Served and Lodged Dec. 23, 1938.
[Endorsed]: Filed Jan. 30, 1939. [126]

In the United States District Court for the Southern District of California, Central Division.

No. 8447-Y

PAUL NESTER and JUAN CHARLES, co-partners,

Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corporation, DOE CORPORATION, DOE TWO CORPORATION, T. J. INIE, JOHN DOE and JOHN DOE TWO,

Defendants.

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Notice is hereby given that The Western Union Telegraph Company, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 5, 1938.

EDWIN CAMACK,
F. A. WATERS,
PILLSBURY, MADISON & SUTRO,
By ALFRED SUTRO.
LAWLER, FELIX & HALL,

By JOHN M. HALL,
Attorneys for Appellant, The Western Union Telegraph Company.
Address: 800 Standard Oil Building, Los Angeles, California.

Copy mailed to August J. O'Connor, Attorney for Plaintiffs, Dec. 13, 1938.

R. S. ZIMMERMAN,
Clerk U. S. District Court, Southern District of California.
By EDMUND L. SMITH,
Deputy.

[Endorsed]: Filed Dec. 13, 1938. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk. [127]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That we, The Western Union Telegraph Company, a New York corporation, as principal, and American Surety Company of New York, a New York corporation, as surety, are held and firmly bound unto Paul Nester and Juan Charles, obligees, in the full and just sum of One Thousand Dollars ($1,000.00) to be paid to said obligees, their at-

torneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Whereas, lately at the District Court of the United States for the Southern District of California, Central Division, in a suit depending in said Court, between said Paul Nester and Juan Charles, co-partners, plaintiffs and The Western Union Telegraph Company, and another, defendants, No. 8447-Y, a judgment [128] was rendered against said The Western Union Telegraph Company in the sum of Five Hundred Dollars ($500.00) exclusive of costs, and said defendant, The Western Union Telegraph Company, has filed in the office of the Clerk of said Court a notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and desires by this supersedeas bond a stay of execution upon said judgment until said appeal be determined;

Now, the condition of the above obligation is such that if said The Western Union Telegraph Company shall prosecute its appeal to effect and satisfy the said judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award, then

the above obligation is void, else to remain in full force and effect.

The undersigned surety consents and agrees that in case of default or contumacy on the part of this principal or surety, the Court may, upon notice to them of not less than ten (10) days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation herein and award execution thereon.

Witness our corporate names by the hand of our duly authorized representatives this 13th day of December, 1938.

THE WESTERN UNION
TELEGRAPH COMPANY.
By J. W. INWOOD,
Superintendent.
Principal.

AMERICAN SURETY
COMPANY OF NEW YORK,
By A. M. WOLD,
Resident Vice President.
Attest: T. TAYLOR,
Resident Assistant Secretary.
Surety.

Premium charged for this bond is $10.00 per annum. [129]

State of California,
County of Los Angeles—ss.

On this 13th day of December, A. D. 1938, before me, Howard McCullock, a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. M. Wold, personally known to me to be the Resident Vice-President and I. Taylor, personally known to me to be the Resident Assistant Secretary of the American Surety Company of New York, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Notarial Seal] HOWARD McCULLOCK,
Notary Public in and for the County of Los Angeles, State of California

My Commission expires Oct. 21, 1940.

United States of America,
State of California,
County of Los Angeles—ss.

On this 13th day of December, 1938, before me, Alice C. Weatherwax, a Notary Public in and for said State and County, personally appeared J. W.

Inwood, known to me to be the Superintendent of The Western Union Telegraph Company, the corporation that executed the within instrument, and known to me to be the person who executed the within instrument on behalf of said corporation, being duly authorized so to do, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] ALICE C. WEATHERWAX,
Notary Public in and for the County of Los Angeles, State of California.

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 3, 1941.

Examined and recommended for approval as provided in Rule 13.

JOHN M. HALL,
Attorney.
Address: 800 Standard Oil Building, Los Angeles, California.

I hereby approve the foregoing.
Dated: this 13th day of December, 1938.

LEON R. YANKWICH,
Judge.

[Endorsed]: Filed Dec. 13, 1938. [130]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Federal Rule of Civil Procedure 75, The Western Union Telegraph Company, appellant upon an appeal herein to the Circuit Court of Appeals for the Ninth Circuit, hereby designates the following to be contained in the record on said appeal:

1. Complaint.
2. Answer of defendants, The Western Union Telegraph Company and Thelma Ivie.
3. Stipulation waiving trial by jury (dated October 12, 1938).
4. Opinion of the United States District Judge (dated November 9, 1938).
5. Minute order November 9, 1938, for judgment against The Western Union Telegraph Company.
6. Substitution of Attorneys (dated November 19, 1938).
7. Objections to Form of Proposed Findings of Fact and Conclusions of Law. [131]
8. Objections to Form of Judgment.
9. Addendum to Opinion of such Judge (dated December 5, 1938).
10. Findings of Fact and Conclusions of Law, together with the direction for the entry of judgment thereon.
11. Judgment.
12. Notice of Appeal with date of filing.

13. Supersedeas Bond.

14. This designation of Contents of Record on Appeal.

15. Condensed Statement in narrative form of all the testimony, including all exhibits received in evidence, which has been prepared by appellant and is served and filed with this designation, pursuant to Federal Rule of Civil Procedure 75(c).

16. Clerk's Certificate.

EDWIN CAMACK,
E. A. WATERS,
PILLSBURY, MADISON & SUTRO,
LAWLER, FELIX & HALL,

By JOHN M. HALL,
Attorneys for defendant and appellant, The Western Union Telegraph Company.
Address: 800 Standard Oil Building, Los Angeles, California.

Received copy of the within Designation this 23rd day of December, 1938.

AUGUST J. O'CONNOR,
By GEORGE J. HIDER,
Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 23, 1938. [132]

[Title of District Court and Cause.]

ORDER UNDER RULE 73(g) EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING ACTION.

Whereas, defendant, The Western Union Telegraph Company, on December 13, 1938, filed herein a written notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment of this Court entered in this action on December 5, 1938; and

Whereas, said defendant, The Western Union Telegraph Company, has heretofore filed a supersedeas bond;

Now, Therefore, good cause appearing therefor, it is hereby Ordered, under Rule 73(g) of the Federal Rules of Civil Procedure, that the time for the docketing of this action in the United States Circuit Court of Appeals for the Ninth Circuit and for the filing of the record on appeal herein be and the same is hereby extended to March 4, 1939.

Dated: January 12, 1939.

LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed January 12, 1939. [133]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. .....

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Appellant,

vs.

PAUL NESTER and JUAN CHARLES, co-partners,

Appellees.

CONCISE STATEMENT OF POINTS ON WHICH THE APPELLANT INTENDS TO RELY

Appellant, The Western Union Telegraph Company, a corporation, presents the following statement of the points on which it intends to rely on the appeal in the above entitled cause:

1. There is no evidence that appellee suffered any damage by reason of delay or non-payment of the money order (Plaintiffs' Exhibit No. 1) at Aramecina, Republic of Honduras.

2. There is no evidence of the amount, if any, of damages suffered by appellees by reason of such delay or non-payment of said money order (Plaintiffs' Exhibit No. 1) at Aramecina, Republic of Honduras.

3. The conditions filed with appellant's schedule of rates with the Federal Communications Commis-

sion, which appear on said money order (Plaintiffs' Exhibit No. 1) and which, among other [135] things, provided that appellant should not be liable for damages for delay or non-payment of said money order, whether by reason of negligence on the part of appellant's agents, servants, or otherwise, beyond the sum of $500, created no obligation for the payment of liquidated damages in the sum of $500 for delay or non-payment of said money order.

4. The trial court held that appellees' alleged loss of goods could not be traced to delay or non-payment of said money order (Plaintiffs' Exhibit No. 1) at Aramecina, Republic of Honduras; it further held that there was no evidence to substantiate appellees' claim that such alleged delay or non-payment of said money order was responsible for appellees' alleged loss of the mining leasehold interest mentioned in the complaint; it further held that there was no substantial proof of any of the special damages, or any of the damages, alleged to have been sustained by appellees; the trial court nevertheless awarded appellees a judgment for damages in the sum of $500.

5. The evidence is insufficient to support the finding that appellees have suffered damage in the sum of $500, and would not support a finding that they have been damaged in any sum by reason of appellant's failure to transmit, deliver, and pay promptly said money order (Plaintiffs' Exhibit No. 1) at Aramecina, Republic of Honduras, and with-

out said finding the findings of the trial court are insufficient to support the judgment.

6. The evidence is insufficient to support the judgment for the reason that there is no evidence that appellees suffered any damage by reason of delay or non-payment of said money order (Plaintiffs' Exhibit No. 1) at Aramecina, Republic of Honduras.

7. The interpretation of said money order (Plaintiffs' Exhibit No. 1) as applicable to foreign commerce as shown by the [136] orders of the Interstate Commerce Commission and the Federal Communications Commission respecting the rate structure applicable to telegraph companies and by the appellant which filed the stipulation in question and by the public which has used such service through a period of years establishes that such stipulation is one for limitation of liability and not a provision for liquidated damages, and to require the appellant to pay $500 in this case in which there was a failure to establish an actual loss, would be in contravention of the commerce clause of the United States Constitution, Article I, Section 8, Subsection 3, and of the Acts of Congress passed in pursuance thereof, particularly the Act of June 18, 1910 (36 Stat. L. 539), and the amendments thereto and the Communications Act of 1934, and of the orders of the Interstate Commerce Commission in the Second Unrepeated Message Case (61 I. C. C. 541) and the orders of the Federal Communications Commission made in accordance therewith.

Appellant specifies that by reason of the above points, severally and collectively, the court erred in awarding appellees a judgment for $500, and should not have awarded appellees a judgment in any amount.

Appellant designates the whole of the record herein as necessary for the consideration of this appeal.

Dated: January 27, 1939.

FRANCIS R. STARK,
EDWIN CAMACK,
F. A. WATERS,
PILLSBURY, MADISON & SUTRO,
LAWLER, FELIX & HALL,
By OSCAR LAWLER
Attorneys for Appellant, The Western Union Telegraph Company. [137]

Received copy of the within Concise Statement this 27th day of January, 1939.

AUGUST J. O'CONNOR,
By GEORGE J. HIDER
Attorneys for Appellees.

LAWLER, FELIX & HALL,
800 Standard Oil Building,
Los Angeles,
Phone Trinity 5111. [138]
Attorneys for Appellant.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION DESIGNATING PARTS OF RECORD TO BE PRINTED

Whereas, appellant, The Western Union Telegraph Company, has heretofore filed a written notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment of the United States District Court for the Southern District of California, Central Division, entered in this action on December 5, 1938; and

Whereas, appellant, pursuant to Federal Rule of Civil Procedure 75(e), has heretofore served and filed with its designation of contents of record on appeal, a condensed statement in narrative form of all testimony including all exhibits received in evidence at the trial of this cause in the United States District Court, such condensed statement being a complete record, and including all proceedings and evidence in the action, and [139] appellees are not dissatisfied with such condensed statement in narrative form and have not required testimony in question and answer form to be substituted for all or any part thereof; and

Whereas, appellant, pursuant to Rule 19 of the Rules of Practice of the United States Circuit Court of Appeals for the Ninth Circuit, will, upon the filing of the record in said United States Circuit Court of Appeals, file with the clerk of said Circuit Court of Appeals a concise statement of the points on which appellant intends to rely on this appeal and will, in such concise statement, designate the

whole of the record herein as necessary for the conclusion of this appeal, and appellees have received and are familiar with the contents of such concise statement and the points referred to therein;

Now, Therefore, it is stipulated between appellees and appellant, by their respective counsel, that the clerk of the United States Circuit Court of Appeals for the Ninth Circuit shall cause to be printed as a part of the record on this appeal and in lieu of the reporter's transcript or parts thereof said entire condensed statement in narrative form, omitting therefrom only the following:

That part of page 12 of said condensed statement, commencing at line 21 on said page, reading as follows:

"On the reverse side of each printed form appears the following):

'1. If the words "New York-South American" are inserted on the face hereof, following the word "Service," then the scope of the voyage contemplated, to the Port of Discharge, is one in either [140] direction in the Carrier's general trade between New York and various ports on the Pacific or west coast of South America between Buenaventura, Colombia and Talcahuano."

and also all of pages 13 to 33, both inclusive, of said condensed statement, the same being the reverse side of the printed forms of the bills of lading which comprise Plaintiffs' Exhibit 5;

it being agreed by all parties hereto that the portions of said condensed statement which it is here

stipulated may be thus omitted upon said printing comprise matter which is entirely irrelevant to a consideration of any of the points to be presented on this appeal.

Dated: January 27, 1939.

AUGUST J. O'CONNOR,

By GEORGE J. HIDER,

Attorney for Appellees.

FRANCIS R. STARK,
EDWIN CAMACK,
F. A. WATERS,
PILLSBURY, MADISON & SUTRO,
LAWLER, FELIX & HALL,

By OSCAR LAWLER,

Attorneys for Appellant, The Western Union Telegraph Company. [141]

In the District Court of the United States for the Southern District of California, Central Division.

No. 8447-Y Law.

PAUL NESTER, et al., co-partners,

Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY, a corporation, et al.,

Defendants.

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing volume containing 142 pages and numbered from 1 to 142, inclusive, contains a full, true and correct copy of the Complaint; Answer; Stipulation waiving jury trial; Order for Judgment; Opinion; Substitution of attorneys; Objections to proposed Findings and Conclusions; Objections to form of Judgment; Order overruling Objections of defendants; Addendum to Opinion; Findings of fact and Conclusions of law; Judgment; Statement of Evidence; Bond on Appeal; Order extending time to docket Appeal Record; Notice on Appeal; Statement of Points by appellant, and Stipulation designating parts to be printed, together constitute the record on Appeal to the United States Circuit Court for the Ninth Circuit;

I Do Further Certify the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to $19.10, and that said amount has been paid me by the appellants herein.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States for the Southern District of California, this 13th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the United States the one hundred and sixty-third.

[Seal] R. S. ZIMMERMAN,
Clerk, United States District Court, for the Southern District of California.

By EDMUND L. SMITH,
Chief Deputy Clerk.

[143]

[Endorsed]: No. 9104. United States Circuit Court of Appeals for the Ninth Circuit. The Western Union Telegraph Company, a corporation, et al., Appellants, vs. Paul Nester and Juan Charles, co-partners, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 14, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9104

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Appellant,

vs.

PAUL NESTER and JUAN CHARLES, co-partners,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, June 9, 1939.

Before: Wilbur, Garrecht and Haney,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr. Alfred Sutro, counsel for appellant, and submitted on behalf of appellees on brief on file, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, September 15, 1939.

Before: Wilbur, Haney and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, Ordered that the typewritten opinion and dissenting opinion this day rendered by this court in above cause be forthwith

filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

OPINION

Before: Wilbur, Garrecht and Haney, Circuit Judges.

Haney, Circuit Judge.

Appellant challenges a judgment rendered against it for breach of its duty to transmit and deliver $150 paid it by appellee Nester, to appellee Charles in the Republic of Honduras.

Appellees, at the time of the transactions in question, were partners engaged in operating, under lease, a mine in the Republic of Honduras. Nester, on August 2, 1937, at Los Angeles, shipped some goods to Charles, who was in the Republic of Honduras. The shipment arrived there on August 15, 1937. The applicable articles of the Honduras statutes, regarding confiscation of the goods are:

"Article No. 4—All goods shall be deposited in the national warehouses. * * *

"Article No. 7—The following merchandise shall not go into the national warehouses, and

shall be entitled to only six days of free deposit on sites within the jurisdiction of the Customshouse:

[The goods listed include those here involved.]

"Two centavos shall be charged daily for each kilogram of merchandise after the fixed period of time has elapsed, to cover the expense of safekeeping the articles under the custody of the state shall not exceed the period of six days on the following goods:

[The goods listed do not include those here involved.]

and fifteen days on all others.

"Article No. 9—The cargo referred to in Article 7th and 8th, shall be considered as of compulsory shipment, and its custody or reshipment must be applied for within the time and conditions established for deposits."

"Article No. 41—The merchandise shall become the property of the State, and will be sold in public auction, whenever its custody, deposit or reshipment are not requested as prescribed by the law—or whenever they are expressly abandoned by their owner."

Charles received notification of the arrival of the goods on August 19, 1937.

On September 1, 1937, Nester at Los Angeles paid appellant $150 to be transmitted and paid to

Charles in the Republic of Honduras, as provided in a money order blank, pursuant to which the money was to be sent. One provision in such blank was:

> "In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, Unless a greater value is stated in writing on the face of the application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

The money was not delivered to Charles. The above mentioned shipment was confiscated.

On July 26, 1938, appellee brought this action against appellant and its agent to recover $7,600 due to the alleged negligence in failing to deliver the money. Upon the trial, in which a jury was waived, appellees failed to prove any damages except the value of the confiscated shipment which was $500. They failed to prove the date of confiscation. The trial court handed down an opinion in which it was said: "the loss of these goods, valued at about five hundred dollars, cannot be traced to the nondelivery

of the money". The opinion further stated that the provision in the money order blank "is a provision for liquidated damages, which entitled the sender to recovery of the minimum amount of five hundred dollars in the absence of any proof or without any offer of proof". In the findings thereafter made, the trial court found that appellees "have suffered and sustained damages, loss and injury in the sum of" $500. Judgment was entered for that sum, from which this appeal is taken.

Upon argument this court questioned the jurisdiction of the lower court, because the citizenship of appellant's agent did not appear in the record, and at its request, the parties have filed briefs upon that question. Upon the authority of Horn v. Lockhart, 84 U. S. (17 Wall.) 570 and Dollar S. S. Lines v. Merz, 9 Cir., 68 F(2d) 594, we think the court below had jurisdiction to render the judgment.

Appellant challenges the finding that appellees were damaged in the sum of $500. Rule 52 of the Federal Rules of Civil Procedure provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *" There was evidence that Charles was unable to pay the charges on the shipment because he did not have the money which was to be forwarded by Nester. The question therefore is when, under the laws of Honduras, the shipment was subject to confiscation. Appellant's inter-

pretation of the laws is shown by the following quotation from its brief: "* * * the goods in question were entitled to six days' free time (Art. 7), *if* their custody was applied for (Art. 9). In default of such application the goods became the property of the state at the end of the six days' free time (Art. 41)." If this interpretation is correct, it is clear that the shipment was subject to confiscation six days after August 15, 1937, which was more than a week prior to the day when Nester attempted to send the money. On the other hand appellees contend that "all of the goods shipped by appellee come within the class of goods allowed *six days free deposit and fifteen days charge* * * * and not the six days free, six days charge; so assuming that the goods arrived in Honduras on the 15th day of August, 1937, they were not subject to confiscation until the 5th day of September, 1937" which was after Charles would have received the money had it been promptly delivered by appellant.

We express no opinion as to which of these opposing contentions is correct. The translation which was introduced in evidence by appellant, regarding the second paragraph of Article No. 7, is either erroneous or incomplete. It may be that the omitted matter, if any, or the correct translation, would disclose the correct meaning. Under the circumstances, speculation is not a proper course of action. For purposes of this decision, we will assume, without so deciding, that appellant's contention is correct.

Appellant contends that the provision in the money order blank was a part of the tariff filed with the Interstate Commerce Commission, and as such limited the damages recoverable to the actual damage, not exceeding $500, and that without actual damage there could be no recovery. The question presented is one of interpretation of the provision, not of validity thereof.

There have been clauses construed which limit liability for damages at not more than a specified sum. Primrose v. Western Union Telegraph, 154 U. S. 1; Postal Tel.-Cable Co. v. Warren-Godwin Co., 251 U. S. 27; Western Un. Tel. Co. v. Esteve Bros. & Co., 256 U. S. 566. In such cases, the damages are limited to the actual damages or the amount stipulated, whichever is less.

In Hart v. Pennsylvania Railroad Co., 112 U. S. 331, a carrier assumed a liability in the transportation of horses at "not exceeding two hundred dollars each". It was clearly intended there that the liability for loss or injury to the horses was confined to their actual value, but if it exceeded $200 each, then recovery was limited to that amount.

In Western Un. Tel. Co. v. Czizek, 264 U. S. 281, a provision substantially identical to the one here was in question. It contained a provision limiting liability for damages, and a provision valuing a telegram at $50. The distinction between the two clauses was adverted to, the court saying (p. 285):

"We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case * * *"

Although the damages greatly exceeded the agreed valuation, it was held that the claim was limited by the valuation clause to that sum. In Western Union v. Priester, 276 U. S. 252, 257, the provision again contained these two clauses. No point was made concerning the valuation clause, and the limitation of liability clause was held applicable.

Here, the provision in question has a limitation of liability clause—"the company shall not be liable for damages * * * beyond the sum of five hundred dollars". The provision also contained a clause by which it was agreed that "the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued" at $500. Although appellant contends that the clause means that such right is valued at not "beyond the sum of" $500, the clause does not so state. It states that such right is valued at $500.

When Nester delivered the $150 to appellant, he had the right to have the money transmitted without unreasonable delay (Western U. Teleg. Co. v. Crovo, 220 U. S. 354) and delivered to Charles. Moore v. New York Cotton Exchange, 270 U. S.

593. Because of appellant's acts, that right was destroyed, and Nester is entitled to recover its value, which the parties agreed was $500.

No contention is made that both clauses are for appellant's benefit, and that appellant had the option to choose which it would rely on. See San Giorgio I v. Rheinstrom Co., 294 U. S. 494, 497; compare Sun Printing & Publishing Assn. v. Moore, 183 U. S. 642. At any rate it is sufficient to say here that no election was made, even though appellant pleaded the provision. It still relies on both clauses, and attempts now to limit the valuation clause. For the reasons expressed, we think the judgment should be and is

Affirmed.

Wilbur, C. J., dissenting.

I dissent. In my opinion the District Court did not have jurisdiction and consequently our jurisdiction is limited to that of reversing the decision of the trial court. Jurisdiction is predicated upon diversity of citizenship. Plaintiffs, who are residents of California, join as defendants the Western Union Telegraph Company, a citizen of New York, T. J. Inie and certain other defendants sued by their fictitious names. The complaint contains no allegation concerning the citizenship or residence of the defendant T. J. Inie. The complaint alleges the joint negligence of all the defendants in delaying the payment of a money order procured by the plain-

tiffs and judgment is prayed for against them all. The defendants Western Union Telegraph Company and Thelma Ivie (sued and served herein as T. J. Inie) answered the complaint and denied the allegation of negligence and for separate defense set up the terms of the contract between the parties for the transmission of money and alleged that under that contract the Western Union Telegraph Company was not liable for delay, non-payment or underpayment of the money order by reason of negligence or otherwise beyond the sum of $500.00. The evidence did not show the citizenship of Thelma Ivie. The trial court delivered its opinion on November 9, 1938, wherein it was held that there was a breach of the contract for the transmission of the money order for $150.00, for which the Telegraph Company was liable for liquidated damages in the sum of $500.00. As to the defendant T. J. Inie the opinion states: "Plaintiffs take nothing against the defendant T. J. Inie [Thelma Ivie]". The findings of fact and conclusions of law which followed the opinion, dated December 5, 1938, contained no reference to the defendant Thelma Ivie except the finding that "T. J. Inie was the duly appointed and acting employee of the Western Union Telegraph Company, a corporation, and was acting within the scope of her authority" and the following in the conclusions of law: "That Paul Nester and Juan Charles, co-partners plaintiff are entitled to recover the amount of five hundred dollars ($500.00)

against the Western Union Telegraph Company only, and not against T. J. Inie." The judgment of the same date gave judgment "in the sum of Five Hundred ($500.00) Dollars against the Western Union Telegraph Company a corporation, only, and for their costs taxed in the sum of $69.11. Cause dismissed as to T. J. Inie."

The majority opinion holds that the dismissal of the action as to T. J. Inie gave the court jurisdiction of the case. I cannot agree to this proposition. The decision in favor of T. J. Inie was one on the merits. The new rules in force at the time the judgment was rendered provide, Sec. 41, subdivision b, as follows:

> "* * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

The trial court had no jurisdiction of the action until the action was dismissed as to T. J. Inie. The dismissal (on the merits) was contemporaneous with and a part of the judgment against the Western Union Telegraph Company. In my opinion the judgment should be reversed for lack of jurisdiction.

If my associates agreed with me on this jurisdictional question it would be unnecessary to consider

the effect of the contract for the transmission of the message and particularly those provisions thereof with reference to the limitation of liability. In view of the fact that the court has passed upon that question it is proper for me to add that I am not in accord with the opinion of the majority with relation to the effect of the contract for the transmission of the message. It is provided in this contract that the damages for non-delivery should not exceed the sum of $500.00. This provision taken alone is clearly a limitation of liability, but because of the language which follows this provision fixing the value of the right to have money orders transmitted at five hundred dollars, the majority holds that the agreement is one for the payment of liquidated damages. In other words, that a right belonging to the plaintiffs valued at $500.00 has been destroyed and that therefore by agreement the amount of recovery should be for that amount. There is no doubt that the language of the contract is susceptible of this construction, but such construction overlooks the historical background and the decisions of the courts and of the Interstate Commerce Commission upon which the terminology of the contract is based. Since jurisdiction over the transmission of interstate telegraph messages has been vested by Congress in the Interstate Commerce Commission by statute approved June 8, 1910, 36 Stat. 539, the Supreme Court has had occasion to pass upon this question of the limitation of the liability of a telegraph com-

pany with relation to the valuation placed upon a message by the agreement of the parties. The Interstate Commerce Commission has permitted and required companies to fix a value upon the message transmitted for each unrepeated message at not less than $500.00. See Western Union Telegraph Co. v. Anderson, 245 S. W. 731. Such provisions have been considered by the Supreme Court. In the case of the Ansaldo San Giorgio I v. Rheinstrom Brothers Co., 294 U. S. 494, the Supreme Court had occasion to refer to the matter in a case dealing with a bill of lading limiting the liability of the carrier. In discussing the effect of the bill of lading the court referred arguendo to the two types of valuation clauses that had been in frequent use by common carriers and refers to a contract similar to that involved in the case at bar as follows:

> "One is a true limitation agreement. It recites that a sum named in the bill of lading is the agreed value of the goods, or their value per unit or per package, in the absence of the shipper's declaration of a higher value; that the rate is fixed with reference to the specified value, and if a greater be declared a higher rate will apply; that in consideration of the rate to be charged, the carrier's liability for loss or damage shall be limited to the stipulated value. In case of loss or damage, this clause enures to the carrier's but not to the shipper's benefit. The latter can in no event recover more than his

actual loss, but may have to take much less. *The damages are computed in the usual way without reference to the stipulation, but if when so computed they exceed the agreed limit of value, no recovery of the excess may be had.* Such a stipulation, we have said, is not enforcible unless the shipper, for agreeing to such a limitation of the carrier's liability, receives a consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation; or, as has been said, the rate is tied to the release. Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence. The agreement as to value, in consideration of carriage at the lower rate thus obtained, is held to estop the shipper from demanding damages in excess of the agreed value." (Italics by the Court.)

In Western Union Telegraph Company v. Czizek, 264 U. S. 281, referred to in the main opinion, the court had under consideration a contract with the Western Union Telegraph Company for the transmission of an unrepeated telegram which, as stated in the main opinion, contained a provision almost identical in terms with that included in the contract of transmission of the money order in the case at bar. The provision is as follows:

"In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing thereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

The Circuit Court of Appeals held that this contract was invalid so far as applied to a case of gross negligence and held the company liable for actual damages in the sum of $4,500 with interest at 7%. The Supreme Court reversed the decision, holding that the claim was "limited to $50.00" by the above quoted terms of the contract. Thus instead of treating the agreement as an agreement for liquidated damages in the sum of $50.00, the court treated it as a contract limiting the liability of the company. The question here involved has been considered by several state courts and in each instance since the assumption of jurisdiction by the United States over the transmission of interstate messages it has been held that the stipulated value of the message was the limit of liability for the actual damages suffered because of nondelivery. Western Union Telegraph Co. v. Anderson (Texas), 245 S. W. 731, decided in

1922; Western Union Telegraph Co. v. Bashinsky, Case & Co. (Alabama), 217 Ala. 661, 117 So. 289, decided in 1928; and Wernick, et al. v. Western Union Telegraph Co., 290 Ill. App. 569, 9 N. E. (2d) 72, decided in 1937.

These decisions discuss the origin and effect of the stipulated value of a message. I think that they are correct, that the valuation of $500.00 stated in the contract is for the purpose of limiting, but not of fixing the damages.

The judgment should be reversed for lack of jurisdiction in the trial court.

[Endorsed]: Opinion and Dissenting Opinion. Filed Sep. 15, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 9104.

THE WESTERN UNION TELEGRAPH COMPANY, a corporation, et al.,

Appellants,

vs.

PAUL NESTER and JUAN CHARLES, co-partners,

Appellees.

JUDGMENT

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellants.

It Is Further Ordered and Adjudged by this Court that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Sept. 15, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, November 27, 1939.

Before: Garrecht, Haney and Stephens, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appel-

lant, filed October 16, 1939, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. Alfred Sutro, counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including January 5, 1940; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, November 28, 1939.

[Endorsed]: Filed Nov. 28, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred sixty (160) pages, numbered from and including 1 to and including 160, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of December, A. D. 1939.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 29, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6206)

FILE COPY

DEC 18 1939

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 5 [illegible]

THE WESTERN UNION TELEGRAPH COMPANY,
a Corporation, Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, Co-partners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANCIS R. STARK,
60 Hudson Street,
New York City, New York,

ALFRED SUTRO,
Standard Oil Building,
San Francisco, California,

OSCAR LAWLER,
Standard Oil Building,
Los Angeles, California,

FRANCIS R. KIRKHAM,
Standard Oil Building,
San Francisco, California,
Attorneys for Petitioner.



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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1939.

No.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, Copartners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above named petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States circuit court of appeals for the ninth circuit entered in the above entitled cause (R. 158), affirming the judgment (R. 50) of the district court of the United States for the southern district of California, central division.

Opinions Below

The opinion of the circuit court of appeals (R. 144) is reported at 106 Fed. (2d) 587. The district court rendered two opinions (R. 21, 39), both of which are reported at 25 F. Supp. 478.

Jurisdiction

The judgment of the circuit court of appeals was entered on September 15, 1939 (R. 159). A timely petition for rehearing was denied on November 27, 1939 (R. 159). The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

The question presented is: Does the limitation of liability provision in petitioner's money order tariff—which is substantially the same as that in its telegraph tariff—constitute a liquidated damage provision which would automatically make petitioner liable for damages in the fixed sum of $500, in case of default in service, regardless of whether or not the sender had sustained any actual damage, or is the provision rather one which fixes a maximum limit within which damages may be proved?

The provision of petitioner's money order tariff involved in this case is (R. 46):

> "In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, UNLESS a greater value is stated in writing on the face of the application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

The court below construed this clause as providing for liquidated damages of $500, regardless of actual damages, whenever the telegraph company fails promptly to transmit the money.

Statutes Involved

The statutes involved are set forth in the Appendix to this petition.

Statement of the Case

On September 1, 1937, respondent Nester paid petitioner, at Los Angeles, California, $150 to be transmitted to respondent Charles at Aramecina, Republic of Honduras (R. 45). By mistake of one of petitioner's employees, the money was sent to British Honduras instead of the Republic of Honduras and was not paid to Charles (R. 45-46).

The provision of petitioner's money order tariff limiting its liability is that set forth above. This provision was part of a schedule of charges, or tariff, which petitioner had filed with the Interstate Commerce Commission on March 9, 1932, and which, under the provisions of the Communications Act of 1934 (Appendix, p. 25), was transferred to the files of the Federal Communications Commission and remained in force after the enactment of that statute (R. 119). By virtue of this statute the rates in petitioner's tariffs on file with the Commission are the only lawful rates on interstate and foreign messages, and the limitation of liability provisions are "a part of the rates themselves" and "the lawful condition upon which [messages are] sent."*

Respondents brought this action against petitioner and one of its employees** to recover special damages in the amount of $7,600 claimed to have been suffered by reason of the non-payment of the money (R. 2, 6-8). Petitioner

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* *Western Union Telegraph Co.* v. *Priester* (1928) 276 U. S. 252, 259.
Western Union Telegraph Co. v. *Esteve Bros. & Co.* (1921) 256 U. S. 566, 571.

** The action was dismissed as to the employee (R. 50).

answered, denying that respondents had suffered any damage (R. 12), and, as a separate defense, pleading that under the above provision in the money order tariff petitioner, in any event, would not be liable beyond the sum of $500 (R. 12-16).

At the conclusion of the trial (a jury having been waived, R. 20), the district court held that respondents had failed to prove that they had suffered any damage by reason of the non-payment of the money (R. 24-25). Nevertheless, the court directed the entry of judgment against petitioner for $500, on the ground that the above-quoted provision in the money order tariff is "a provision for liquidated damages which entitled the sender to recovery of the minimum amount of $500 *in the absence of any proof [of damages] or without any offer of proof*" (R. 26).* This ruling was directly opposed to the allegations and prayer of the complaint and to the theory upon which the case had been brought and tried (R. 27-28), and was made by the court on its own motion, the point not having been raised by either of the parties. Petitioner objected to proposed findings based upon the ruling (R. 35-36), but the court overruled these objections (R. 39) and, in a supplementary opinion, adhered to its conclusions (R. 39-43).

The circuit court of appeals affirmed the judgment of the district court (R. 158). Judge Wilbur dissented (R. 151).

Specifications of Errors to be Urged

The circuit court of appeals erred:

1. In holding that the limitation of liability provision in petitioner's money order tariff is a provision for liquidated damages.

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* Emphasis by italics is ours throughout the petition unless otherwise noted.

2. In holding that respondents are entitled to recover $500 from petitioner in the absence of proof of actual damages in any amount.

Reasons for Granting the Writ

1. The decision of the circuit court of appeals is in conflict with *Wernick* v. *Western Union Telegraph Co.* (1937) 290 Ill. App. 569, 9 N. E. (2d) 72, and *Miazza* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 178 S. E. 764—the only two cases in which the question here involved has ever been raised. In the *Wernick* case the court held (290 Ill. App., pp. 573-574):

> "Although this particular clause has been a part of the rules, regulations, classifications and tariffs of the telegraph company since 1921, it has never been interpreted as a liquidated damage provision, and no cases are cited which would justify such an interpretation. * * * The fair interpretation of the provision as a whole must necessarily give effect to the plainly expressed clauses which precede and follow the so-called liquidated damage provision, stating that '*in any event, the company shall not be liable for damages* for delay, nonpayment or underpayment of this money order, whether by reason of negligence on the part of its agents, servants, or otherwise, *beyond the sum of $500* * * *, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid, based on such value, equal to one-tenth of 1 per cent thereof.' The provision, when read in its entirety, was clearly intended to fix, not a definite liability, but a maximum liability or agreed valuation upon which the rate to be paid for the shipment or carriage is to be collected." (Italics by the court.)

In the *Miazza* case the plaintiff sought to recover $500 without proof of actual damage, alleging in his complaint that the above provision in petitioner's tariff is one for

liquidated damages. The court sustained a demurrer, holding that the provision is not one for liquidated damages and that, if it were construed to provide for payment of $500 without proof of actual damage, it would be an invalid penalty.

2. The decision of the circuit court of appeals is untenable, is utterly without precedent, and is inconsistent with prior decisions of this court, and of lower federal and state courts.

A glance at the history of the tariff provision in question and the reasons which lead to its adoption will, we submit, make manifest the error of the court below.

It long has been settled that a common carrier "cannot contract for relief from liability for his own negligence, even though he give a special consideration for an agreement to that effect."* And the general common law rule is that

> "A bargain for exemption from liability * * * for the consequences of negligence is illegal if
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> * * * * * * *
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> "(b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public for which it has received or been promised compensation."**

It is also settled, however, that a common carrier may limit its liability for negligence *to the amount of an agreed value*, if it maintains rates dependent upon the value declared in writing by the shipper.***

Early in the history of telegraphy the limitation provisions in appellant's tariffs were similar to those involved

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* *San Giorgio I.* v. *Rheinstrom Co.* (1935) 294 U. S. 494, 496; *Railroad Company* v. *Lockwood* (1873) 17 Wall. 357, 384.

** Restatement of the Law of Contracts, sec. 575 (1).

*** *Adams Express Co.* v. *Croninger* (1913) 226 U. S. 491.

in *Primrose* v. *Western Union Telegraph* (1894) 154 U. S. 1, which we quote in the footnote.* These provisions did *not* contain a valuation of the message. Their validity was attacked in numerous cases, on the ground that telegraph companies could not limit their liability for damage resulting from negligence. A conflict of authority arose—some cases sustaining the limitation provisions; others holding them void.** When the question finally came before this court in the *Primrose* case, the court sustained the provisions. It held that telegraph companies "are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities" (154 U. S. 14); and it decided that the strict rule of the common law, applicable to common carriers, should not be applied to telegraph companies. The court referred to the common law rule, however, as an analogy, and sustained the provisions on the ground that they did not provide for a complete exemption from liability, but offered alternative limits of liability for alternative rates.

The decision of this court in the Primrose case, however, did not completely protect telegraph companies against the

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* "[1st] • • • It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same;

"[2d] nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured;

"[3d] nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages." (154 U. S. 13)

** The cases are legion. See, generally, 62 C. J. 171, 177; 26 R. C. L. 570; 11 L. R. A. (N. S.) 561; 35 A. L. R. 336.

possibility of unlimited liability for messages. Until 1910 telegraph companies were not subject to the Interstate Commerce Act. Their relations with their patrons were matters of contract, not subject to the rule of equality and uniformity even when the transactions were interstate. Each state court, in telegraph cases coming properly before it, was free to adopt its own views as to the construction and validity of the provision for limitation of liability for unrepeated messages, *Western Union* v. *Esteve Bros.*, 256 U. S. 566, *Western Union* v. *Priester*, 276 U. S. 252. A majority of the state courts continued to hold that the common law rule against limitation of liability for negligence was applicable—sometimes because the laws of the particular state declared telegraph companies to be common carriers—and pronounced the limitation invalid in the only cases in which it would have been of any use, namely, where there had been negligence. Many courts, including some federal courts, held that it did not apply to faults in the service which a repetition of the message would not have prevented; a view ultimately sustained by this court, *Western Union* v. *Czizek* (1924), 264 U. S. 281. It was also generally held (before 1910) that the stipulation was no protection to the company in cases of "gross negligence". Even after telegraph companies were brought under the Interstate Commerce Act in 1910, so that the rule of equality and uniformity applied to all interstate and foreign messages, and "gross" negligence made no difference, *Western Union* v. *Priester* (1928), 276 U. S. 252, and state courts were bound, as to such messages, to follow the decisions of this court as to the construction and validity of the limitations of liability, they still remained free to apply their own rules with respect to intrastate messages, which constitute a considerable proportion of the business. In this situation, under the compelling necessity to avoid the hazard of unlimited liability for a message costing only a few cents, petitioner

added to its tariffs the provision now in question,* phrasing it strictly pursuant to the rule that

> "A bargain by a common carrier or other person charged with a duty of public service *limiting to a reasonable agreed valuation the amount of damages recoverable* for injury to property by a non-wilful breach of duty is lawful."**

This rule applies, of course, not only to injuries to property, but also to every kind of damage resulting from default in service.***

In the light of the foregoing considerations the meaning and intent of the provision in question are free from doubt. It is a provision by which a value is declared—not for the purpose of fixing an amount of liquidated damages—*but for the purpose of fixing the applicable rate,* and, at the same time, the *maximum* liability in case of loss. It has so been construed and applied by this court. In *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281, 284-285, this

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* Clause 2 of the message tariff was first adopted with a limitation of liability of $50.00. This clause is quoted in the opinion of this court in *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281, 283. It is, as the court below pointed out (R. 149), substantially identical with the money order tariff provision here involved, and reads as follows:

> "2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, *at which amount this telegram is hereby valued,* unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

** Restatement of the Law of Contracts, sec. 575 (2).

*** *S. E. Express Co.* v. *Pastime Amusement Co.* (1936), 299 U. S. 28.

court, speaking of the similar provisions in petitioner's message tariffs, said:

> "* * * as in fact it [the alleged negligence of the company] is that of servants, reasonable self-protection is allowed to the master against their neglects. One such self-protection sanctioned by the decisions is *a valuation of the message, with liberty to the sender to fix a higher value on paying more for it.*"

See also,

Western Union Telegraph Co. v. *Esteve Bros. & Co.* (1921) 256 U. S. 566, 574, 575;
Western Union Telegraph Co. v. *Priester* (1928) 276 U. S. 252, 259.

Such provisions have been uniformly construed as entitling the sender to recover only for actual loss or damage up to, but not beyond, the amount of the declared value.

See

San Giorgio I v. *Rheinstrom Co.* (1935) 294 U. S. 494, 496-497 (quoted from in the dissenting opinion, R. 155-156).

Illustrative of the rulings is the language of the court in *Western Union Telegraph Co.* v. *Jacobs* (1926) 115 Tex. 240, 246, 280 S. W. 733:

> "* * * we hold that the stipulations pleaded are obligatory upon Jacobs, but that he is entitled to recover *his damages within the $50.00 valuation.*"

Similar rulings occur in many cases, a number of which we cite in the footnote.* In these and numerous other cases

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* *Williams* v. *Western Union Telegraph Co.* (1925) 218 Mo. App. 364, 275 S. W. 570, 572;
Western Union Telegraph Co. v. *T. C. Davis Cotton Co.* (1926) 170 Ark. 506, 280 S. W. 977, 979;

(*Footnote continued on next page.*)

the courts have rendered decisions upon the unquestioned assumption that recovery can be had only for damages actually sustained, up to the limit of the declared value;* *never* before has any court allowed a recovery except for actual loss.

Although the earlier cases do not deal with the exact point decided in the case at bar they nevertheless establish, we submit, the correct construction of petitioner's tariff. It is "inconceivable," to use the language of the court in

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Thayer v. *Western Union Telegraph Co.* (1937). Not officially reported. 6 N. E. (2d) 821;
Waters v. *Western Union Telegraph Co.* (1927) 194 N. C. 188, 138 S. E. 608, 611;
Nolte Brass Foundry Co. v. *Western Union Telegraph Co.* (D. C. Ohio, 1930) 38 F. (2d) 838, 841;
Dowling v. *Western Union Telegraph Co.* (1st C. C. A., 1937) 92 F. (2d) 864, 865;
Klotz v. *Western Union Telegraph Co.* (1920) 187 Iowa 1355, 175 N. W. 825, 831;
Western Union Telegraph Co. v. *Halbert* (1921) 124 Miss. 214, 86 So. 760, 761.

* For examples, in addition to the decisions of this court above cited, see:
Western Union Telegraph Co. v. *Downs* (1929) 178 Ark. 933, 12 S. W. (2d) 887;
Western Union Telegraph Co. v. *Eckhardt* (Tex. Civ. App. 1927. Not officially reported.) 2 S. W. (2d) 505, modified and affirmed (Tex. Comm. App., 1929. Not officially reported.) 11 S. W. (2d) 777;
Western Union Telegraph Co. v. *Sharp* (Tex. Civ. App., 1928. Not officially reported.) 5 S. W. (2d) 567;
Davenport v. *Western Union Telegraph Co.* (1932) 91 Mont. 570, 9 P. (2d) 172;
Jacobs v. *Western Union Telegraph Co.* (1917) 196 Mo. App. 300, 196 S. W. 31;
Naive-Spillers Corp. v. *Postal Telegraph-Cable Co.*, 4 Tenn. App. 435;
Western Union Telegraph Co. v. *Geo. F. Fish, Inc.* (1925) 148 Md. 210, 129 Atl. 14;
Western Union Telegraph Co. v. *Lee* (1917) 174 Ky. 210, 192 S. W. 70;
Ingram v. *Hughes* (1933) 170 S. C. 1, 169 S. E. 425;
Lynch v. *Western Union Telegraph Co.* (1929) 224 Mo. App. 50, 18 S. W. (2d) 535.

Legault v. *Board of Trustees* (1911) 161 Cal. 197, that, if the provision in question were a stipulation for liquidated damages, this court and the lower federal and state courts would not "long ago have so declared and thus have done away with a vast amount of the argumentative reasoning in which [they have] indulged and which is and was entirely superfluous if the contention of appellant herein is sound."*

3. The decision of the circuit court of appeals is inconsistent with the order of the Interstate Commerce Commission under which the tariff provision in question has been promulgated and the rates of petitioner established thereunder. As such the decision raises an important question of federal law which should be settled by this court.

In 1921 the Interstate Commerce Commission reopened an investigation of the "Rules Limiting Liability on the Several Classes of Messages, Dependent upon the Rates Paid". *Limitations of Liability in Transmitting Telegrams*, 61 I. C. C. 541. A tariff provision substantially identical with the one involved in this case was before the Commission, except that at that time the liability was limited in the case of messages not specially valued to $50. Following this investigation the Commission concluded that the existing limitation of liability provisions in the company's rates were unreasonable; and it ordered (p. 550)

> " . . . that the *maximum liability* in the case of a message for the transmission of which the unrepeated rate is charged should be not less than $500, and for a message received for transmission at the repeated rate, $5,000, which *limitations* we find to be reasonable as parts of the respective rates."

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* To the same effect, see

Atkins v. *The Disintegrating Company* (1873) 18 Wall. 272, 305-306;

Western Union Telegraph Co. v. *Schriver* (8th C. C. A., 1905) 141 Fed. 538.

This determination was based upon the well-settled construction by the Interstate Commerce Commission of rules limiting liability that the company "within the value so placed upon the message assumes liability to the full extent *of the loss sustained*". 44 I. C. C. 670 at 675. The Commission did not sustain as reasonable rates which would include a stipulation to pay liquidated damages.*

The Commission had said of the original fifty-dollar valuation clause in the message tariff, which this court had before it later in *Western Union* v. *Czizek* (1924) 264 U. S. 281:

> "To afford protection against extravagant claims for damages on account of errors or delays which a repetition of the message would not have prevented provision is made by the Western Union for *a limitation of liability* to $50.00 * * * ". 61 I. C. C. 543.

And its order was that this maximum limit of liability should be increased: "Provision should be made for the transmission of valued messages *under a liability limited to* the value stated in writing by the sender of the message at the time it is offered for transmission" etc. In pursuance of this direction petitioner filed new message tariffs, containing a valuation clause identical in language except for the increased amount of the valuation; a clause beyond question intended, and understood by the Commission to be intended, to provide for a maximum limitation of liability and nothing else (R. 59). The valuation clause in the money transfer tariff, which is the particular tariff in-

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* Construing this order of the Commission, the court in *Western Union Telegraph Co.* v. *Anderson* (Tex. Civ. App. 1922. Not officially reported.) 245 S. W. 731, 732, said:

> "It thus clearly appears that the Commission was not undertaking to fix a minimum of absolute liability in cases of negligence in the transmission or non-delivery of interstate messages, but a minimum below which telegraph companies could not limit their maximum liability."

volved here, was substantially copied* from the message tariff except for the amount.

The construction given to the provisions by the court below is untenable because repugnant to the rule that where one possible construction of a tariff will make it valid, and another construction will render it unlawful, the former construction will be adopted.

Great Northern Ry. v. *Delmar Co.* (1931) 283 U. S. 686, 690, 691.

If petitioner's rates are construed—as they have been by the court below—to include an agreement to pay $500 in every case of default in service without proof of any loss, they would be unlawful, not only because they would be inconsistent with the order of the Interstate Commerce Commission in *Limitations of Liability in Transmitting Telegrams, supra,* but also because they would be palpably unjust and unreasonable and thus in violation of the provisions of section 201 of the Communications Act of 1934 (Appendix, p. 23).

The unreasonableness of petitioner's rates, as construed by the court below, is sufficiently apparent in the

* The message tariff makes the sender value the message and the money order tariff makes him value the right to have the money paid; but there is no difference in the legal effect. Both clauses, like the corresponding provision in a railroad or express tariff, apply not only to cases where the articles themselves are lost, but to damages from delay, that is to say for the violation of the *right* to have the goods delivered. *S. E. Express Company* v. *Pastime Company,* (1936) 299 U. S. 28. Even when a carrier loses goods in transit the recovery, in the last analysis, like all civil recoveries, is a recovery for the violation of a right—the right to have the goods transported safely. There was some question at the beginning whether the valuation of a "money order" would be held valid, since the money order—the piece of paper—can have no value, and it was thought that some court might insist that the only thing that was valuable was the right to have it paid, which had not been valued.

present case; it is even more apparent if the case of a specially valued message is supposed. In such case a sender could tender $1.00 for transmission to petitioner, declare the value of his right to have this money promptly transmitted to be $100,000, and then, if he were able to prove delay or nonpayment by reason of the negligence of any one of petitioner's servants, collect $100,000 from petitioner without proof of the loss of a single cent.

Moreover the provision, as construed by the court below, is an invalid penalty. An agreement to pay a fixed sum will be given effect as a provision for liquidated damages only when it is clear that the sum named is a *bona fide* pre-estimate of the probable damages which would follow a breach of contract.* If the agreement is "to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach," it is an unenforceable penalty.**

As construed by the court below, the clause provides for payment of $500 in every case, regardless of circumstances, where the company fails promptly to transmit and pay the money. This is a penalty. In *Miazzà* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 522-523, 178 S. E. 764, the court, so ruling, said:

> "Agreements to pay fixed sums as damages for breaches of contracts, where the amount plainly has no reasonable relation to any probable actual damage which may follow a breach, will not be enforced for the agreed amount as liquidated damages, but

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* *Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226; *United States* v. *United Engineering Co.* (1914) 234 U. S. 236, 241; *Wise* v. *United States* (1919) 249 U. S. 361, 365.

** *Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226; *Miazza* v. *Western Union Telegraph Co.*, 50 Ga. App. 521, 178 S. E. 764, 765.

will be construed as mere unenforceable provisions for penalties. [Cases.]

Since the petition and its exhibits plainly indicate that the amount printed in the ordinary printed blank form of the telegraph company as the value of the plaintiff's right to have the money promptly and correctly transmitted and paid to the addressee did not represent any bona fide effort between the parties to fix in advance the actual damage to the plaintiff from any breach of the contract by the defendant, but since the petition and the exhibits show that the stipulation contained in the usual printed form represented no more than an attempt to set up a fixed and uniform penalty for any and all breaches of the contract without any reference to the facts or circumstances or the actual damages sustained, such a provision will not support an action for a failure to perform the contract."

4. The circuit court of appeals misconstrued and misapplied the decisions of this court in *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281, and *Sun Printing & Publishing Assn.* v. *Moore* (1902), 183 U. S. 642.

The court below erroneously construed the provision in question as containing two completely separate and unrelated clauses (R. 149-151). In support of this ruling it said that this court, in the *Czizek* case, adverted to the "distinction between the two clauses" as follows (264 U. S. 281, 285):

> "We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case * * *"

This is a plain misapplication of the decision of this court. The tariff involved in the *Czizek* case *did* contain two sepa-

rate clauses, which we quote in the footnote;* but only *one* of the separate clauses referred to in that case is contained in the tariff covering the money order involved in the case at bar. When this court referred to the distinction between the two clauses in the *Czizek* case, it referred to the distinction between *separate* clauses 1 and 2. It held clause 2 (the clause here involved) applicable and treated it as one indivisible clause under which petitioner's liability is "limited" to the amount of the declared value (264 U. S. 281, 286).**

Both courts below also misapplied the *Sun Printing & Publishing* case (R. 26, 41, 151). That case involved an ordinary contract—not a limitation of liability provision in the tariff of a telegraph company which, as a matter of law, is a part of the established rates (*Western Union Tele-*

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* "1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for the non-delivery, of any repeated telegram beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for non-delivery of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty-Dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one percent. thereof" (264 U. S. 281, 283; 276 U. S. 252, 257).

** While it is not pertinent to the question involved in the case at bar, it may be noted that this court, in the *Czizek* case, held clause 1 inapplicable for the following reason: That case involved an unrepeated message. At the time of the decision, many courts had held that clause 1 (as it then read) was not intended to apply to the sort of default in service which repetition would not have prevented. The message in the *Czizek* case was never sent from the office of origin, and was, therefore, in this class.

graph Co. v. Priester, 276 U. S. 252, 259). In the *Sun Printing & Publishing Association* case, the intent of the parties to provide for liquidated damages was clear; in the present case it is entirely lacking. In the former case, as this court pointed out, the parties agreed *bona fide* upon the actual value of the yacht, and intended "to treat the sum named as estimated and ascertained damages for a breach of the covenant to return the yacht" (183 U. S. 668). If the charterer had thought that the yacht was not worth $75,000, he could have insisted that the valuation be reduced or be dispensed with entirely, or he could have refused to hire the yacht. Petitioner's position, under the provision in the case at bar, is totally different. It cannot refuse a money order; it cannot dispense with the valuation, it cannot alter the valuation—no matter how high, or how arbitrary, under the circumstances, the value may appear. Any sender may name any value he wishes, $1,000; $100,000—and petitioner, as a matter of law, must accept the value. If a special value is not stated, the $500 valuation is applicable—again as a matter of law—whether the money order be large or small, important or of little consequence. Such a provision does not reflect an intent by both of the parties to pre-estimate and agree upon probable damages. On the contrary, the clause itself and the circumstances surrounding its adoption "negative any notion that the parties really meant to provide a measure of compensation" (*Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 226).

5. The decision of the circuit court of appeals involves an important question of federal law which has not been, but should be, settled by this court.

The limitation provision here in question has been a part of the money order tariff for nearly eight years; it is substantially identical with provisions which have been in petitioner's message tariffs for more than twenty-nine

years. Following the decision of the circuit court of appeals petitioner amended its tariffs to avoid any possibility of further misconstruction. The amended tariffs apply, however, only to future transactions, and the precautionary filing of the amendments does not affect the importance of the instant case. Petitioner has transmitted during the past few years nearly one-half million revenue-bearing messages every day, exclusive of the millions of special greeting messages transmitted on holidays; of these, approximately 3,000,000 per year were money orders. The average number of handlings per message is five; and, notwithstanding every precaution, the ratio of default in telegraph service is approximately 1 to 2000. Petitioner's potential liability under the decision below with respect to money orders alone (sent within the applicable periods of limitation) is approximately twelve million dollars. The imposition of such a burden and the attendant burden of litigation would affect in a most serious manner petitioner's service to the public. Since the rendition of the decision of the district court in this case, claims and suits based upon the decision have been filed against petitioner, and petitioner has been notified that, as to complaints already on file, the plaintiffs will seek recovery on the theory advanced by the courts below; it is a virtual certainty that numerous other suits will be filed. In this connection we emphasize that there is little if any possibility that a conflict of decisions between circuit courts of appeals will hereafter arise. Diversity of citizenship is or ordinarily will be present and the question is one of federal law, but the amount involved—$500—is less than the amount required to give a federal court jurisdiction. The conflict presently existing—between the decision below and that of the highest court of a state in which a decision could be had by petitioner (supra, pp. 5, 6)—is, therefore, the only conflict of decisions upon which petitioner can rely.

The general importance which is attached to the decision in this case is also shown by three recent case notes, two of them commenting adversely on the decision of the district court (52 Harv. L. Rev. 839; 24 Corn. L. Q. 601), and one commenting adversely on the decision of the circuit court of appeals. (88 University of Pennsylvania Law Review, No. 2, 224).

Conclusion

The petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
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APPENDIX.

APPLICABLE PROVISIONS OF THE INTERSTATE COMMERCE ACT AND OF THE COMMUNICATIONS ACT OF 1934.

By the Act of June 18, 1910 (36 Stat. 539, 544, et seq.), the Interstate Commerce Act was amended to include telegraph companies. They remained subject to the Interstate Commerce Act, and to the jurisdiction of the Interstate Commerce Commission, until the enactment of the Communications Act of 1934 (48 Stat. 1064).

The provisions of the Interstate Commerce Act pertinent to the case at bar, as they read prior to the enactment of the Communications Act of 1934, are as follows (U.S.C. 49:1, et seq.):

"Section 1. (1) The provisions of this chapter shall apply to common carriers engaged in—

* * * * * * *

(e) The transmission of intelligence by wire or wireless from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

* * * * * * * *

(3) The term 'common carrier' as used in this chapter shall include * * * telegraph, telephone, and cable companies operating by wire or wireless; * * *.

* * * * * * * *

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith,

shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by wire or wireless subject to the provisions of this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: * * *.

* * * * * * *

Section 15. (1) Whenever, after full hearing, * * * the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier * * * for the transmission of messages * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, * * *."

The provisions of the Communications Act of 1934, pertinent to the case at bar, are as follows (U.S.C. 47:151, et seq.):

"Section 151. For the purpose of regulating interstate and foreign commerce in communication by wire and radio * * * and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commis-

sion', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Section 152. (a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio * * *.

* * * * * * *

Section 201.

* * * * * * *

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: * * *.

* * * * * * *

Section 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting

carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

* * * * * * *

Section 602.

* * * * * * *

(b) The provisions of Chapter 1 of Title 49 [the Interstate Commerce Act], insofar as they relate to communication by wire or wireless, or to telegraph, telephone, or cable companies operating by wire or wireless, except the last proviso of section 1 (5) and the provisions of section 1 (7), are repealed.

* * * * * * *

Section 603.

* * * * * * *

(b) There are transferred to the jurisdiction and control of the Commission * * * (2) all records under the jurisdiction of the Interstate Commerce Commission * * * relating to the duties, powers, and functions imposed upon and vested in the Commission by this chapter.

* * * * * * *

Section 604. (a) All orders, determinations, rules, regulations, permits, contracts, licenses, and privileges which have been issued, made, or granted by the Interstate Commerce Commission, * * * under any provision of law repealed or amended by this chapter or in the exercise of duties, powers, or functions transferred to the Commission by this chapter, and which are in effect at the time this section takes effect, shall continue in effect until modified, terminated, superseded, or repealed by the Commission or by operation of law."

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 597

THE WESTERN UNION TELEGRAPH COMPANY,
a corporation,
Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, copartners,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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Supreme Court of the United States,

OCTOBER TERM, 1939.

No. 597

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,
Petitioner,
vs.
PAUL NESTER and JUAN CHARLES, copartners,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the circuit court of appeals (R. 144) is reported at 106 F. (2d) 587. The district court rendered two opinions (R. 21, 39), both of which are reported at 25 F. Supp. 478.

Jurisdiction

The judgment of the circuit court of appeals was entered September 15, 1939 (R. 159). A timely petition for rehearing was denied November 27, 1939 (R. 159). The petition for certiorari was filed December 18, 1939, and was granted January 29, 1940. The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Is the limitation of liability provision in petitioner's money order tariff a liquidated damage provision which automatically makes petitioner liable for damages in the fixed sum of $500 in each case of default in service, regardless of whether or not the sender has sustained any actual damage, or is the provision one fixing a maximum limit within which damages may be proved?

Statutes Involved

The statutes involved are set forth in Appendix A to this brief.

Statement of the Case

On September 1, 1937, respondent Nester paid petitioner, at Los Angeles, California, $150 to be transmitted to respondent Charles, his partner, at Aramecina, Republic of Honduras (R. 45). By mistake of one of petitioner's employees, the money was sent to British Honduras instead of to the Republic of Honduras and was not paid to Charles (R. 45-46).

One of the provisions of petitioner's money order tariff, pursuant to which the money was sent, was the following (R. 46):

> "In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, UNLESS a greater value is stated in writing on the face of the application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

This provision was part of a schedule of charges, or tariff, which petitioner had filed with the Interstate Commerce Commission on March 9, 1932, and which, under the provisions of the Communications Act of 1934 (Appendix A, p. 35), was transferred to the files of the Federal Communications Commission and remained in force after the enactment of that Act (R. 119).

Respondents brought this action against petitioner and one of its employees[1] to recover special damages in the sum of $7,600 claimed to have been suffered by reason of the nonpayment of the money (R. 2, 6-8). Petitioner answered, denying that respondents had suffered any damage (R. 12), and, as a separate defense, pleading that under the above provision in the money order tariff petitioner, in any event, would not be liable beyond the sum of $500 (R. 12-16).

At the conclusion of the trial (a jury having been waived, R. 20), the district court held that respondents had failed to prove that they had suffered any damage by reason of the nonpayment of the money (R. 24-25). Nevertheless, the court directed the entry of judgment against petitioner for $500, on the ground that the above-quoted provision in the money order tariff is "a provision for liquidated damages which entitled the sender to recovery of the minimum amount of five hundred dollars *in the absence of any proof [of damages] or without any offer of proof*" (R. 26).[2] This ruling was directly opposed to the allegations and prayer of the complaint and to the theory on which the case had been brought and tried (R. 27-28); it was made by the court on its own motion, the point not having been raised by either of the parties. Petitioner objected to proposed findings based upon the ruling (R. 35-36), but the court overruled these objections (R. 39) and, in a supplementary opinion, adhered to its conclusion (R. 39-43).

---

[1] The action was dismissed as to the employee (R. 50).

[2] Emphasis by italics is ours throughout the brief, unless otherwise noted.

The circuit court of appeals affirmed the judgment of the district court (R. 158). Judge WILBUR dissented (R. 151).

Specifications of Errors to be Urged

The circuit court of appeals erred:

1. In holding that the limitation of liability provision in petitioner's money order tariff is a provision for liquidated damages.

2. In holding that respondents are entitled to recover $500 from petitioner in the absence of proof of actual damages in any amount.

Summary of Argument

1. The valuation clause in the limitation of liability provision is not a provision for liquidated damages. It is a declaration of value upon which the rate is based, made in conformity with the common law rule applicable to limitation-of-liability provisions in the tariffs of common carriers and other public service companies. As such it fixes the maximum—not the absolute—liability in case of loss.

2. Even if it could be assumed that the court below was correct in its ruling that the provision in question was intended as one for liquidated damages, the court nevertheless should not have enforced the provision until its validity, as so construed, had been passed on by the Federal Communications Commission.

3. The judgment cannot be sustained on the theory that plaintiffs proved an actual loss of $500.00 or more.

ARGUMENT

I

The limitation of liability provision in petitioner's tariff is not a provision for liquidated damages.

A. The valuation clause in the limitation of liability provision is a declared value upon which the rate is based; as such it fixes a maximum limit of liability within which recovery may be had for damages actually sustained.

The courts below construed the limitation of liability provision in petitioner's tariff as "a provision for liquidated damages, which entitled the sender to recovery of the minimum amount of five hundred dollars in the absence of any proof [of damages] or without any offer of proof" (R. 26, 150-151). This ruling is clearly erroneous and in conflict with the uniform construction given to petitioner's tariff by every court, State and Federal, which has considered its provisions, and by the Interstate Commerce Commission.[3] A glance at the history of the provision in question and the reasons which led to its adoption will, we believe, make manifest the error of the courts below.

It has long been settled that a common carrier "cannot contract for relief from liability for his own negligence, even though he give a special consideration for an agreement to that effect."[4] And the general common law rule is that

> "A bargain for exemption from liability . . . for the consequences of negligence is illegal if
>
> . . . . . .
>
> (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence

[3] For general discussions of the decisions in the case at bar, we call attention to three recent case notes, two of them commenting adversely on the decision of the district court (52 Harv. L. Rev. 889; 24 Cornell L. Q. 601), and one commenting adversely on its affirmance by the circuit court of appeals (88 U. Pa. L. Rev. 224).

[4] *San Giorgio I* v. *Rheinstrom Co.* (1935) 294 U. S. 494, 496; *Railroad Company* v. *Lockwood* (1873) 17 Wall. 357, 384.

in the performance of any part of its duty to the public for which it has received or been promised compensation.'"[5]

It is also settled, however, that a common carrier may limit its liability for negligence *to the amount of an agreed value*, if it maintains rates dependent upon the value declared in writing by the shipper.[6]

Early in the history of telegraphy the limitation provisions in appellant's tariffs were similar to those involved in *Primrose* v. *Western Union Telegraph* (1894) 154 U. S. 1, which we quote in the footnote.[7] These provisions did not contain a valuation of the message. Their validity was attacked in numerous cases, on the ground that telegraph companies could not limit their liability for damage resulting from negligence. A conflict of authority arose—some cases sustaining the limitation provisions; others holding them void.[8] When the question finally came before this court in the *Primrose* case, the court sustained the provisions. It held that telegraph companies "are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities" (154 U. S. 14); and it decided that the strict rule of the common law, applicable to common carriers, should not be applied to telegraph companies. The court referred to the common

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[5] Restatement of the Law of Contracts, sec. 575 (1).

[6] *Adams Express Co.* v. *Croninger* (1913) 226 U. S. 491.

[7] "[1st] * * * It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same;

[2d] nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured;

[3d] nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages" (154 U. S. 13).

[8] The cases are legion. See, generally, 62 C. J. 171, 177; 26 R. C. L. 570; 11 L. R. A. (N. S.) 561; 35 A. L. R. 336.

law rule, however, as an analogy, and sustained the provisions on the ground that they did not provide for a complete exemption from liability, but offered alternative limits of liability for alternative rates.

The decision of this court in the *Primrose* case, however, did not completely protect telegraph companies against the possibility of unlimited liability. Until 1910 telegraph companies were not subject to the Interstate Commerce Act. Their relations with their patrons were matters of contract, not subject to the statutory rule of equality and uniformity even when the transactions were interstate. Each State court, in telegraph cases coming properly before it, was free to adopt its own views as to the construction and validity of the provision for limitation of liability (*Western Union Telegraph Co.* v. *Esteve Bros.* (1921), 256 U. S. 566; *Western Union Telegraph Co.* v. *Priester* (1928), 276 U. S. 252), and a majority of the State courts continued to hold that the common law rule against limitation of liability for negligence was applicable—sometimes because the laws of the particular State declared telegraph companies to be common carriers—and pronounced the limitation invalid.[9]

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[9] See authorities referred to in footnote 8, supra. We quote from one case—the decision of the supreme court of Mississippi in *Postal Telegraph & Cable Co.* v. *Wells* (1903), 82 Miss. 733, 35 So. 190, 192—as illustrative:

> "Prior to the passage of our present Constitution, in 1890, the question of the power of telegraph companies to limit their liability for their own negligence was in doubt * * *. But the adoption of section 195, Const. 1890, in our judgment, removes all doubt as to what the true rule is in Mississippi. Section 195 declares that 'telegraph companies are common carriers in their respective lines of business, and subject to liabilities as such.' As common carriers, under the common law, any stipulation to exempt themselves from liability for their own negligence would be void, and the supreme court of this state has always held that no common carrier can restrict by contract the consequence of its own wrongdoing; * * *. The stipulations of the telegraph company here under consideration are simply an effort to contract for protection against the effect of its own wrongdoing—an attempt to limit its liability for its own negligence—and, as such, are invalid, as being opposed to public policy."

It was also generally held (before 1910) that the provision was invalid in cases of "gross" negligence.[10] Even after telegraph companies were brought under the Interstate Commerce Act,[11] so that the rule of equality and uniformity applied to all interstate and foreign messages (*Western Union Telegraph Co.* v. *Esteve Bros.* (1921), 256 U. S. 566; *Western Union Telegraph Co.* v. *Priester* (1928), 276 U. S. 252), the State courts were still free to apply their own rules with respect to *intrastate* messages, which constitute a considerable proportion of petitioner's business.

In this situation, under the compelling necessity to avoid the hazard of unlimited liability for a message costing only a few cents, petitioner added to its tariffs the provision now in question,[12] phrasing it strictly pursuant to the rule that:

> "A bargain by a common carrier or other person charged with a duty of public service *limiting to a reasonable agreed valuation the amount of damages*

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[10] Not until *Western Union Telegraph Co.* v. *Priester* (1928) 276 U. S. 252, did this court—resolving a conflict of decisions—finally decide that, with respect to interstate and foreign messages, the limitation provision is valid in cases of so-called "gross" negligence.

[11] By the Act of June 18, 1910 (36 Stat. 539, 544, et seq.). See p. 12, et seq., of this brief.

[12] Clause 2 of the message tariff was first adopted with a limitation of liability of $50.00. This clause is quoted in the opinion of this court in *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281, 283. It is, as the court below pointed out (R. 149), substantially identical with the money order tariff provision here involved, and reads as follows:

> "2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount *this telegram is hereby valued*, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

> *recoverable* for injury to property by a non-wilful breach of duty is lawful." [13]

This rule applies, of course, not only to injuries to property, but also to every kind of damage resulting from default in service.[14]

In the light of the foregoing considerations the meaning and intent of the provision in question are free from doubt. It is a provision by which a value is declared—not for the purpose of fixing an amount of liquidated damages—*but for the purpose of fixing the applicable rate*, and, at the same time, the *maximum* liability in case of default in service. It has so been construed and applied by this court. In *Western Union Telegraph Co.* v. *Czizek* (1924) 264 U. S. 281, 284-285, this court, speaking of the similar provisions in petitioner's message tariffs, said:

> "* * * as in fact it [the alleged negligence of the company] is that of servants, reasonable self-protection is allowed to the master against their neglects. One such self-protection sanctioned by the decisions is *a valuation of the message, with liberty to the sender to fix a higher value on paying more for it.*"

See also,

> *Western Union Telegraph Co.* v. *Esteve Bros. & Co.* (1921) 256 U. S. 566, 574, 575;
> *Western Union Telegraph Co.* v. *Priester* (1928) 276 U. S. 252, 259.

Such provisions have been uniformly construed as entitling the sender to recover only for actual loss or damage up to, but not beyond, the amount of the declared value.

See

> *San Giorgio I* v. *Rheinstrom Co.* (1935) 294 U. S. 494, 496-497 (quoted from in the dissenting opinion, R. 155-156).

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[13] Restatement of the law of Contracts, sec. 575 (2).

[14] *S. E. Express Co.* v. *Pastime Amusement Co.* (1936), 299 U. S. 28.

Illustrative of the rulings in the lower Federal and State courts is the language of the court in *Western Union Telegraph Co.* v. *Jacobs* (1926) 115 Tex. 240, 246, 280 S. W. 733:

> "* * * we hold that the stipulations pleaded are obligatory upon Jacobs, but that he is entitled to recover *his damages within the $50.00 valuation.*"

Similar rulings occur in many cases, a number of which we cite in the footnote.[15] In these and numerous other cases the courts have rendered decisions on the unquestioned assumption that recovery can be had only for damages actually sustained, up to the limit of the declared value;[16] *never* before has any court allowed a recovery except for actual loss.

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[15] *Williams* v. *Western Union Telegraph Co.* (1925) 218 Mo. App. 364, 275 S. W. 570, 572;
Western Union Telegraph Co. v. *T. C. Davis Cotton Co.* (1926) 170 Ark. 506, 280 S. W. 977, 979;
Thayer v. *Western Union Telegraph Co.* (1937) (Mass. Advance Sheets, 1937, 215) 6 N. E. (2d) 821;
Waters v. *Western Union Telegraph Co.* (1927) 194 N. C. 188, 138 S. E. 608, 611;
Nolte Brass Foundry Co. v. *Western Union Telegraph Co.* (D. C. Ohio, 1930) 38 F. (2d) 838, 841;
Dowling v. *Western Union Telegraph Co.* (1st C. C. A., 1937) 92 F. (2d) 864, 865;
Klotz v. *Western Union Telegraph Co.* (1920) 187 Iowa, 1355, 175 N. W. 825, 831;
Western Union Telegraph Co. v. *Halbert* (1921) 124 Miss. 214, 86 So. 760, 761.

[16] For examples, in addition to the decisions of this court above cited, see:
Western Union Telegraph Co. v. *Downs* (1929) 178 Ark. 933, 12 S. W. (2d) 887;
Western Union Telegraph Co. v. *Eckhardt* (Tex. Civ. App., 1927) 2 S. W. (2d) 505, modified and affirmed (Tex. Comm. App., 1929) 11 S. W. (2d) 777;
Western Union Telegraph Co. v. *Sharp* (Tex. Civ. App., 1928) 5 S. W. (2d) 567);
Davenport v. *Western Union Telegraph Co.* (1932) 91 Mont. 570, 9 P. (2d) 172;

(*Footnote continued on next page.*)

Although the earlier cases do not deal with the exact point decided in the case at bar, they nevertheless establish the correct construction of petitioner's tariff. It is "inconceivable," to use the language of the court in *Legault* v. *Board of Trustees* (1911) 161 Cal. 197, that, if the provision in question were a stipulation for liquidated damages, this court and the lower Federal and State courts would not "long ago have so declared and thus have done away with a vast amount of the argumentative reasoning in which [they have] indulged and which is and was entirely superfluous if the contention of appellant herein is sound."[17]

The exact question here involved has been raised in only two cases: *Wernick* v. *Western Union Telegraph Co.* (1937) 290 Ill. App. 569, 9 N. E. (2d) 72; and *Miazza* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 178 S. E. 764. In the *Wernick* case the court rejected the contention that the provision should be construed as one for liquidated damages, saying (290 Ill. App. 573-574):

> "Although this particular clause has been a part of the rules, regulations, classifications and tariffs of the telegraph company since 1921, it has never been interpreted as a liquidated damage provision, and

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Jacobs v. *Western Union Telegraph Co.* (1917) 196 Mo. App. 300, 196 S. W. 31;
Naive-Spillers Corp. v. *Postal Telegraph-Cable Co.*, 4 Tenn. App. 435;
Western Union Telegraph Co. v. *Geo. F. Fish, Inc.*, (1925) 148 Md. 210, 129 Atl. 14;
Western Union Telegraph Co. v. *Lee* (1917) 174 Ky. 210, 192 S. W. 70;
Ingram v. *Hughes* (1933) 170 S. C. 1, 169 S. E. 425;
Lynch v. *Western Union Telegraph Co.* (1929) 224 Mo. App. 50, 18 S. W. (2d) 535.

[17] To the same effect, see
Atkins v. *The Disintegrating Company* (1873) 18 Wall. 272, 305-306;
Western Union Telegraph Co. v. *Schriver* (8th C. C. A., 1905) 141 Fed. 538.

> no cases are cited which would justify such an interpetation. * * * The fair interpretation of the provision as a whole must necessarily give effect to the plainly expressed clauses which precede and follow the so-called liquidated damage provision, stating that '*in any event, the company shall not be liable for damages* for delay, nonpayment or underpayment of this money order, whether by reason of negligence on the part of its agents, servants, or otherwise, *beyond the sum of $500* * * *, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid, based on such value, equal to one-tenth of 1 per cent thereof.' The provision, when read in its entirety, was clearly intended to fix, not a definite liability, but a maximum liability or agreed valuation upon which the rate to be paid for the shipment or carriage is to be collected'' (italics by the court).

In the *Miazza* case the plaintiff sought to recover $500 without proof of actual damage, alleging in his complaint that the provision in question is one for liquidated damages. The court sustained a demurrer, holding that the provision is not one for liquidated damages and that, if it were construed to provide for payment of $500 without proof of actual damage, it would be an invalid penalty.

It thus appears that the ruling of the court below is in conflict with an unbroken course of judicial decision. In addition to this, it is also in direct opposition to the construction given to petitioner's tariff by the Interstate Commerce Commission.

In 1910, the Interstate Commerce Act was amended to include telegraph companies (Act of June 18, 1910, c. 309, § 7, 36 Stat. 544; U. S. C. 49:1). By that amendment those companies were declared to be common carriers within the meaning of the Act and were subjected to its provisions; jurisdiction over their rates and charges was conferred upon the Interstate Commerce Commission; it was provided

that all such rates and charges should be reasonable and that any unjust rate or charge was unlawful; and it was further provided that messages might be classified into "repeated, unrepeated * * * and such other classes as are just and reasonable, *and different rates may be charged for the different classes of messages*" (U. S. C. 49:1 (5)).[18]

In May, 1916, acting under authority of the Interstate Commerce Act, as amended by the Act of June 18, 1910, petitioner filed its tariffs, including limitation of liability provisions, with the Interstate Commerce Commission. By virtue of that Act, the rates established by these tariffs were the only lawful rates on interstate and foreign messages, and the limitation of liability provisions were "a part of the rates themselves" and "the lawful condition upon which [the message] was sent."

Western Union Telegraph Co. v. *Priester*, supra, 276 U. S. 252, 259;
Western Union Telegraph Co. v. *Esteve Bros. & Co.*, supra, 256 U. S. 566, 571;
Unrepeated Message Case, 44 I. C. C. 670, 675-676.

In 1917 the reasonableness of the limitation-of-liability provisions was challenged in a proceeding before the Inter-State Commerce Commission. *Unrepeated Message Case*, supra, 44 I. C. C. 670. A tariff provision substantially identical with the one involved in this case was before the Commission, except that at that time the liability was limited in the case of messages not specially valued to $50.[19] The Commission pointed out that under this provision petitioner, "within the value so placed upon the message, assumes liability to the full extent *of the loss sustained*" (44 I. C. C. at p. 675). With this construction as the basis of its decision the Commission held that peti-

[18] Pertinent provisions of the Interstate Commerce Act, as amended, are set out in Appendix A.

[19] See 44 I. C. C. at p. 672.

tioner's rates, with the restricted liability attached thereto, were lawful rates expressly sanctioned by the provisions of the Act of June 18, 1910.

Four years later, in 1921, the Commission reopened its investigation of the "rules limiting liability on the several classes of messages, dependent upon the rates paid." *Limitations of Liability in Transmitting Telegrams,* 61 I. C. C. 541. Again the same tariff provision was before the Commission[20] and again the Commission, construing this provision, said that the provision was "designed to insure the sender *against any loss within the value placed upon the message*" (61 I. C. C. at p. 543). Following this further investigation, the Commission concluded that the existing limitation of liability provisions in petitioner's rates were unreasonable, and it ordered (61 I. C. C. at p. 550)

> "* * * that the *maximum liability* in the case of a message for the transmission of which the unrepeated rate is charged should be not less than $500, and for a message received for transmission at the repeated rate, $5,000, which *limitations* we find to be reasonable *as parts of the respective rates.* Provision should be made for the transmission of valued messages under a *liability limited to the value stated in writing* by the sender of the message at the time it is offered for transmission upon payment of the repeated rate plus one tenth of 1 per cent of the stated value in excess of $5,000."

Pursuant to this order petitioner filed new message tariffs, containing a valuation clause identical in language except for the increased amount of the valuation: a clause beyond question intended, and understood by the Commission and by the public to be intended,[21] to provide for a maximum limitation of liability and nothing else (R. 59). The valuation clause in the money order tariff, which is the

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[20] See 61 I. C. C. at p. 543.

[21] See Appendix B, p. 37.

particular tariff involved here, was substantially copied[22] from the message tariff except for the amount.

The district court in this case, recognizing that its decision was in conflict with these decisions of the Commission, summarily dismissed them as "meaning little" (R. 42):

> "The fact that the Interstate Commerce Commission has not foreseen the possibility of interpreting the clause as a clause for liquidated damages *means little*. Even governmental regulatory bodies may be guilty of oversight."

In contrast, this court has held that administrative construction by the Commission "is entitled to great weight and should not be overturned except for cogent reasons[23]; and it is settled by numerous authorities that the construction of a tariff by the Commission, although not binding

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[22] The message tariff makes the sender value the message and the money order tariff makes him value the right to have the money paid; but there is no difference in the legal effect. Both clauses, like the corresponding provision in a railroad or express tariff, apply not only to cases where the articles themselves are lost, but to damages from delay, that is to say for the violation of the *right* to have the goods delivered. *S. E. Express Co.* v. *Pastime Co.* (1936) 299 U. S. 28. Even when a carrier loses goods in transit the recovery, in the last analysis, like all civil recoveries, is a recovery for the violation of a right—the right to have the goods transported safely. There was some question when the money order tariff was adopted whether the valuation of a "money order" would be held valid, since the money order—the piece of paper—can have no value, and it was thought that some court might insist that the only thing that was valuable was the right to have it paid, which had not been valued. The district court did not place the decision on the ground that any difference in language between message tariff and money order tariff justified a difference in construction, but on the ground that the Interstate Commerce Commission, in construing the message tariff as a limitation rather than a liquidation, was wrong (R. 42).

[23] *United States* v. *Chicago North Shore R. Co.* (1933) 288 U. S. 1, 13-14;
N. Y. Central Securities Co. v. *U. S.* (1932) 287 U. S. 12, 24.

on the courts, is a decision by a body of experts which is entitled to great weight.[24]

In the proceedings before the Commission the public was widely represented, a large number of users of the telegraph having appeared by counsel, who presented oral argument, or filed briefs, or both. The petitioner (respondent in those proceedings) clearly and unmistakably stated its own intention in framing the disputed clause, and there could have been no possible mistake or misunderstanding as to what it was supposed to mean either on the part of the Commission or of any of the interveners. This understanding is more fully shown by the excerpts from the record and briefs in the proceedings before the Commission which are printed as Appendix B.

B. The construction given to the provision in question by the court below renders nugatory the major part of the provision, and, is, therefore, repugnant to the rule that, if possible, a construction will be adopted which gives effect to all the terms of the provision.

Under fundamental rules of construction, the provision in question must be considered as a whole, and if possible,

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[24] "While the decisions of the Interstate Commerce Commission are not conclusive here, they are of great weight. They are especially persuasive in this highly technical field of rate construction and rate interpretation."

Updike Grain Corporation v. *St. Louis & S. F. Ry. Co.* (8th C. C. A., 1931) 52 F. (2d) 94, 96.

To the same effect, see:

Empire Refining Co. v. *Davis* (E. D. Okla., 1925) 6 F. (2d) 305, 306;

Davis v. *Prairie Pipe Line Co.* (8th C. C. A., 1924) 298 F. 393, 397;

Atlantic Bridge Co. v. *Atlantic Coast Line R. Co.* (S. D. Fla., 1932) 56 F. (2d) 163, 166 (affirmed, 57 F. (2d) 654);

Hygrade Food Products Corp. v. *Chicago, M., St. P. & P. R. Co.* (S. D. N. Y., 1935) 10 F. Supp. 767, 770 (reversed on other grounds, 85 F. (2d) 113).

a construction adopted which will give effect to all its terms.[25]

The first words of the clause,

> "In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars,"

are conceded by the court below to be a "limitation of liability clause" (R. 150). They clearly provide that the company shall be liable only for actual damages up to, but not beyond, the sum of $500. Under the decision of the court below, however, these words have been rendered nugatory. If the clause has the meaning given to it by that court then recovery in *every* case, whether or not there has been any damage, must be in *the exact amount of $500* (or in such greater amount as the sender may have declared). In other words, the construction given to the provision by the court below would make it read:

> "If the company fails promptly and correctly to transmit and pay this money order, it will pay the sender $500."

This, manifestly, is an inadmissible construction.

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[25] *O'Brien* v. *Miller* (1897) 168 U. S. 287, 297;
Pressed Steel Car Co. v. *Eastern Ry. Co. of Minnesota* (8th C. C. A., 1903) 121 F. 609, 611;
Sasinowski v. *Boston & M. R. R.* (1st C. C. A., 1935) 74 F. (2d) 628, 633.

This familiar principle has consistently been applied to the construction of tariffs.

Wheelock v. *Walsh Fire Clay Products Co.* (8th C. C. A., 1932) 60 F. (2d) 415, 417-418;
Pillsbury Flour Mills Co. v. *Great Northern Ry. Co.* (8th C. C. A., 1928) 25 F. (2d) 66, 69.

C. The construction given to the provision in question by the court below is untenable because directly contrary to the intent of the parties.

In construing a provision to determine whether it is one for liquidated damages, "The question always is *what did the parties intend by the language used?*"[26] This intent is ascertained by an examination of the provision itself,[27] and also, if the meaning of the language is not wholly free from doubt, by an examination of "the facts surrounding the case * * * 'Previous and contemporaneous transactions may be all very properly taken into consideration to ascertain * * * the sense in which the parties may have used particular terms.'"[28] The provision will be construed as one for liquidated damages only if it clearly appears that the parties "fairly and understandingly" intended "to treat the sum as estimated and ascertained damages."[29]

In the case at bar neither of the parties intended to fix the sum of $500 as liquidated damages. This is clear whether the intent is sought in the "facts surrounding" the adoption of the provision, or in the words of the provision itself. Petitioner manifestly had no such intention. This appears beyond question from the history of the provision and the reasons for its adoption hereinabove set forth. It is equally clear that respondents had no intention to agree upon the sum of $500 as liquidated damages. Their understanding is unmistakably evidenced by what

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[26] *United States* v. *Bethlehem Steel Co.* (1907) 205 U. S. 105, 119;
Kothe v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226;
Sun Printing & Publishing Assn. v. *Moore* (1902) 183 U. S. 642, 662, 668, 673.

[27] *Wise* v. *United States* (1919) 249 U. S. 361, 365.

[28] *United States* v. *Bethlehem Steel Co.* (1907) 205 U. S. 105, 118.

[29] *Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226;
United States v. *United Engineering Co.* (1914) 234 U. S. 236, 241;
Wise v. *United States* (1919) 249 U. S. 361, 365.

they did in this case; they brought suit on the theory that they were required to plead and prove damages, and attempted, though ineffectually, to do so.

If consideration is confined to the words of the clause itself, the intent is quite as clear. The opening words of the clause show that the intent is to make the declared value the *maximum* limit of liability for damages actually sustained. In addition, the right to have the money order promptly paid is not valued at $500; it is valued at $500 *unless* a higher value is stated. Under this provision a sender may name any value he wishes—$1,000; $100,000—and the company, as a matter of law, must accept the value. If a special value is not stated, the $500 valuation is applicable—again as a matter of law—whether the money order be large or small, important or unimportant. Such a provision does not reflect an intent by both of the parties to pre-estimate and agree upon the probable damages. On the contrary, the clause itself and the circumstances surrounding its adoption "negative any notion that the parties really meant to provide a measure of compensation" (*Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 226).

D. The construction given to the provision in question by the court below is repugnant to the rule that where one possible construction of a tariff will make it valid, and another construction will render it invalid, the former construction will be adopted.

The Interstate Commerce Act, as amended by the Act of June 18, 1910, required that rates of telegraph companies should be just and reasonable, and declared unlawful every unjust and unreasonable rate.[30] Section 201 of the Communications Act of 1934 (48 Stat. 1070; U. S. C. 47:201) reenacted these provisions as follows:

> "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any

[30] See Appendix A, p. 31.

> such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: * * *."

As pointed out above (page 14 of this brief), the Interstate Commerce Commission, in *Limitations of Liability in Transmitting Telegrams*, 61 I. C. C. 541, ordered petitioner to establish *limitations of liability* to *maximums* of not less than $500; and these limitations were found "to be reasonable as parts of the respective rates" (61 I. C. C. at p. 550). This determination of the reasonableness of the rates was based upon the well-settled construction by the Commission of the provisions limiting liability, namely, that petitioner "within the value so placed upon the message, assumes liability to the full extent of the loss sustained" (44 I. C. C. at p. 675; 61 I. C. C. at p. 543). The Commission did not sustain as reasonable rates which include a stipulation to pay liquidated damages.[31]

It thus clearly appears that if petitioner's rates should be construed—as they have been by the court below—to include an agreement to pay $500 in every case of default in service without proof of any loss, they would be *converted into rates entirely different from those held reasonable by the Commission* and would be unlawful, not only because they would be inconsistent with the order of the Commission in *Limitations of Liability in Transmitting Telegrams, supra*, but also because they would be palpably unjust and unreasonable and thus in violation of the express provisions of the law (section 201 of the Communications Act of 1934).

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[31] Construing this order of the Commission, the court, in *Western Union Telegraph Co.* v. *Anderson* (Tex. Civ. App., 1922) 245 S. W. 731, 732, said:

> "It thus clearly appears that the Commission was not undertaking to fix a minimum of absolute liability in cases of negligence in the transmission or non-delivery of interstate messages, but a minimum below which telegraph companies could not limit their maximum liability."

The unreasonableness of petitioner's rates, as construed by the court below, is sufficiently apparent in the present case; it would be even more apparent if the case of a specially valued message were supposed. In such case a sender could tender $1 for transmission to petitioner, declare the value of his right to have this money promptly transmitted to be $100,000, and then, if he were able to prove delay or nonpayment by reason of the negligence of any one of petitioner's servants, collect $100,000 from petitioner without proof of the loss of a single cent. In this connection we may point out that the ratio of default in telegraph service, notwithstanding all the precautions that can be taken, is about 1 to 2,000, and an absolute liability for each default would put into effect a system akin to a lottery, with prizes amounting to millions of dollars annually, which no public service commission would approve.[32]

Moreover the provision, as construed by the court below, is an invalid penalty under general principles of law. An agreement to pay a fixed sum will be given effect as a provision for liquidated damages only when it is clear that the sum named is a *bona fide* pre-estimate of the probable damages which would follow a breach of contract.[33] If the

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[32] The Western Union Telegraph Company transmits each year approximately three million money orders. While it is known from experience that there will be some fault in the service in connection with about 1,500 of these, the fate of any particular money order, as a public service commission would properly regard it, is as much a matter of pure chance as the final resting place of a roulette ball. No carrier could reasonably suppose that the expenditure of vast sums in paying $500 for each default in service would be justified by any increased use of its service in the hope on the part of the senders that they would be fortunate enough to be among those whose money orders would be delayed; and even if a carrier proposed such rates, the Commission and the courts would declare, beyond doubt, that the vast sums it thus proposed to spend should rather be spent in the improvement and extension of the service or the reduction of rates.

[33] *Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226;
United States v. *United Engineering Co.* (1914) 234 U. S. 236, 241;
Wise v. *United States* (1919) 249 U. S. 361, 365.

agreement is "to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach," it is an unenforceable penalty.[34]

As construed by the court below, the clause provides for payment of $500 in every case, regardless of circumstances, where petitioner fails promptly to transmit and pay the money. This is a penalty. In *Miazza* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 522-523, 178 S. E. 764, the court, so ruling, said:

> "Agreements to pay fixed sums as damages for breaches of contracts, where the amount plainly has no reasonable relation to any probable actual damage which may follow a breach, will not be enforced for the agreed amount as liquidated damages, but will be construed as mere unenforceable provisions for penalties. [Cases]
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> "Since the petition and its exhibits plainly indicate that the amount printed in the ordinary printed blank form of the telegraph company as the value of the plaintiff's right to have the money promptly and correctly transmitted and paid to the addressee did not represent any bona fide effort between the parties to fix in advance the actual damage to the plaintiff from any breach of the contract by the defendant, but since the petition and the exhibits show that the stipulation contained in the usual printed form represented no more than an attempt to set up a fixed and uniform penalty for any and all breaches of the contract without any reference to the facts or circumstances or the actual damages sustained, such a provision will not support an action for a failure to perform the contract."

It follows from the foregoing that the construction adopted by the court below is untenable because repugnant

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[34] *Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226; *Miazza* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 178 S. E. 764, 765.

to the settled rule that where one possible construction of a tariff will make it valid, and another construction will render it invalid, the former construction will be adopted.

Great Northern Ry. v. *Delmar Co.* (1931) 283 U. S. 686, 690-691.[35]

That it is "possible" to construe the provision in petitioner's tariff as a lawful limitation of liability and not as an invalid stipulation for liquidated damages is surely not debatable, in view of the fact that the former construction has been uniformly adopted by the courts and by the Interstate Commerce Commission during the many years in which the provision has been in force.[36]

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[35] Other cases in accord are:

Hobbs v. *McLean* (1886) 117 U. S. 567;
Ewing v. *Howard* (1868) 7 Wall. 499;
Tyson v. *Moore* (5th C. C. A., 1937) 92 F. (2d) 741;
Intermountain Building & Loan Ass'n v. *Gallegos* (9th C. C. A., 1935) 78 F. (2d) 972, 981.

[36] Such, also, is the construction which uniformly has been given to the provision by petitioner and its patrons. A provision substantially identical with that here involved has been in petitioner's tariffs for more than twenty-nine years. During these years, millions of customers have sent messages and money orders, and thousands of claims have been filed. In only *one* case (*Miazza* v. *Western Union Telegraph Co.*, supra, pp. 12, 22 of this brief) has any patron ever made a claim or brought suit against petitioner upon the theory that the provision constitutes an agreement to pay $500 without proof of loss. In this connection it should be noted that in the case at bar the point was raised by the trial court, not by the respondents; and in *Wernick* v. *Western Union Telegraph Co.*, supra, pp. 11, 12 of this brief, the complaint alleged special damages and was drafted upon the theory that plaintiffs could recover only such damages as they could prove were actually sustained by them. (See the opinion of the court, and the concurring opinion, 9 N. E. (2d) 74, 75.)

E. The courts below misconstrued and misapplied the decisions of this court in *Western Union Telegraph Co.* v. *Czizek* (1924) 264 U. S. 281, and *Sun Printing & Publishing Assn.* v. *Moore* (1902) 183 U. S. 642.

The court below erroneously construed the provision in question as containing two completely separate and unrelated clauses (R. 149-151). In support of this ruling it said that this court, in the *Czizek* case, adverted to the "distinction between the two clauses" as follows (264 U. S. 281, 285):

> "We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case * * *."

This is a plain misapplication of the decision of this court. The tariff involved in the *Czizek* case *did* contain two separate clauses, which we quote in the footnote;[37] but only *one* of the separate clauses referred to in that case is contained in the tariff covering the money order involved in the case at bar. When this court referred to the distinction

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[37] "1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated telegram, beyond the amount received for sending the same nor for mistakes or delays in the transmission or delivery, or for the non-delivery, of any repeated telegram beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for non-delivery of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty-Dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one percent. thereof" (264 U. S. 281, 283; 276 U. S. 252, 257).

between the two clauses in the *Czizek* case, it referred to the distinction between *separate* clauses 1 and 2. It held clause 2 (the clause here involved) applicable and treated it as one indivisible clause under which petitioner's liability is "limited" to the amount of the declared value (264 U. S. 281, 286).[38]

Both courts below also misapplied the *Sun Printing & Publishing* case (R. 26, 41, 151). That case involved an ordinary contract—not a limitation-of-liability provision in the tariff of a telegraph company which, as matter of law, is a part of the established rates (*Western Union Telegraph Co.* v. *Priester*, 276 U. S. 252, 259). In the *Sun Printing & Publishing* case the intent of the parties to provide for liquidated damages was clear; in the present case such intent is entirely lacking. In the former case, as this court pointed out, the parties agreed *bona fide* upon the actual value of the yacht, and intended "to treat the sum named as estimated and ascertained damages for a breach of the covenant to return the yacht" (183 U. S. 668). **If the charterer had thought that the yacht was not worth $75,000, he could have insisted that the valuation be reduced or be dispensed with entirely, or he could have refused to hire the yacht. Petitioner's position under the provision in the case at bar is totally different. It cannot refuse a money order; it cannot dispense with the valuation; it cannot alter the valuation—no matter how high, or how arbitrary, under the circumstances, the value may appear.**

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[38] While it is not pertinent to the question involved in the case at bar, it may be noted that this court, in the *Czizek* case, held clause 1 inapplicable for the following reason: That case involved an unrepeated message. At the time of the decision, many courts had held that clause 1 (as it then read) was not intended to apply to the sort of default in service which repetition would not have prevented. The message in the *Czizek* case was never sent from the office of origin, and was, therefore, in this class.

II

Even if it could be assumed that the court below was correct in its ruling that the provision in question was intended as one for liquidated damages, it nevertheless should not have enforced the provision until its validity, as so construed, had been passed upon by the Federal Communications Commission.

What has been said establishes beyond question that the court below misconstrued the limitation-of-liability provision in petitioner's tariff. But even if the inadmissible assumption were made that the provision was intended to have the meaning attributed to it by the court below, still, we submit, that court should not have enforced the provision until its validity as so construed had been passed upon by the Federal Communications Commission. The question of the reasonableness and legality of petitioner's rates, including the provisions limiting liability, is subjected by the Communications Act of 1934 to the administrative authority of the Federal Communications Commission (see Appendix A, p. 34). Under the principles recently laid down by this court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, decided January 2, 1940, No. 129, October Term, 1939, the court below, if it were of the opinion that petitioner's tariff contained a provision for the payment of $500 in every case of default in service regardless of loss, should have stayed its hand, while retaining jurisdiction of the case, pending a determination by the Commission of the lawfulness and reasonableness of the tariff as so construed.

III

The judgment cannot be sustained on the theory that plaintiffs proved an actual loss of $500 or more.

The money order in question, for $150, was sent on September 1, 1937 by the plaintiff Nester from Los Angeles to the plaintiff Charles in Honduras in order to pay the charges on certain mining equipment which had been shipped to Honduras for use at a mine which plaintiffs were operating under a lease. If the defendant had properly performed its contract, the money should have been paid on September 3, 1937, but it was not tendered to the payee until some time between September 28th and October 7th (R. 94). The plaintiffs contend that as a direct result of the breach (1) they lost their mining leasehold and (2) the shipment, of the value of $500, was forfeited. There was no serious attempt to prove the first item. The district court said there was no evidence to substantiate the claim that the failure of this small sum of money to arrive early in September was responsible for the loss of the lease (R. 25), and the court of appeals said there was no proof of "any damages except the value of the confiscated shipment, which was $500". As to the confiscation of the shipment, the burden was clearly on the plaintiffs to show the date when the forfeiture occurred; for in the absence of such proof there is nothing to show that it did not occur before September 3rd, or so much later that the plaintiffs, by reasonable diligence, might have obtained the necessary funds in another way. See *Barrett* v. *Van Pelt*, (1925) 268 U. S. 85, 92.

Although it appeared that the witness Charles, one of the plaintiffs, had in his possession "a written statement from the authorities telling me that the goods were confiscated as of a particular date" (R. 121), the plaintiffs carefully refrained from introducing any proof as to this

date; and there was therefore no evidence whatever that there was any connection between the breach of contract and the loss of the goods. The district court stated plainly that the loss of the goods "cannot be traced to the non-delivery of the money" (R. 25); and its finding of fact (R. 47) that by reason of the failure to pay the money promptly "the plaintiffs have suffered and sustained damages, loss and injury, in the sum of $500" was either a conclusion of law, based on its erroneous construction of the tariff provision, or, if considered as a true finding of fact, entirely without evidence to support it.

The court of appeals did not pass on the sufficiency of the proof as to the cause of the forfeiture, but assumed, without deciding, that defendant's contention about it was correct. The point is however so plain that no further litigation about it should be necessary. Even if there had been any causal connection between the failure to pay the money and the forfeiture, the rule has always been that a telegraph company, quite apart from any limitations of liability in its tariffs, is responsible only for such losses as it could reasonably have contemplated,[39] and no special notice of the purpose of this money order was alleged or proved. All the telegraph company knew was that Nester wished to send $150 to Charles (R. 52, 106). The district court thought (R. 23, 24) that this rule did not apply because the complaint was "framed" in tort, and erroneously applied to it the provision of the California civil code that a person injured by the tort of another may recover losses whether they can be anticipated or not. But even if this is the State law it is inapplicable to an interstate or foreign message under the rule of equality and uniformity, and the Federal rule (like the rule in most States) has always been that where the foundation of the claim is a mere non-feasance, i. e., a simple failure to perform a duty under-

[39] *Primrose* v. *W. U.* (1894) 154 U. S. 1; and the many cases collected in 62 C. J. 230, 231, note 63.

taken by contract, there is no significance in the distinction between actions "sounding" in contract and those "sounding" in tort.[40]

The right of the plaintiffs to recover in another action the principal sum of $150.00 paid to the defendant was expressly reserved by the district court (R. 48).[41] This of course would include the right to recover interest. It follows that the judgment of the circuit court of appeals should

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[40] *Western Union Telegraph Co.* v. *Hall* (1923) 287 F. 297;
Ferrerro v. *Western Union Telegraph Co.* (1896) 9 App. D. C. 455, 35 L. R. A. 548;
Kerr S. S. Co. v. *Radio Corporation* (1927) 245 N. Y. 284, 157 N. E. 140, 55 A. L. R. 1139;
62 C. J. 231, note 66.

In the *Kerr S. S. Co.* case, *supra*, the court, speaking through Judge CARDOZO, said (157 N. E., p. 142):

> "The plaintiff makes the point that the action is one in tort for the breach of a duty owing from a public service corporation, and that the rule of Hadley *v.* Baxendale does not protect the carrier unless sued upon the contract. There is much authority the other way. Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883; Western Union Tel. Co. *v.* Hall (C. C. A.) 287 F. 297; Bertuch *v.* United States & Hayti Telephone & Cable Co., 79 Misc. Rep. 10, 15, 139 N. Y. S. 289; Fitch *v.* Western Union Tel. Co., 150 Mo. App. 149, 130 S. W. 44; Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924; Newsome *v.* Western Union Tel. Co., 153 N. C. 153, 69 S. E. 10; cf. 3 Hutchinson on Carriers, §§ 1360, 1367, 1368, 1370. Though the duty to serve may be antecedent to the contract, yet the contract when made defines and circumscribes the duty. * * * As it is, there is little trace of a disposition to make the measure of the liability dependent on the form of action. A different question would be here if the plaintiff were seeking reparation for a wrong unrelated to the contract, as e. g., for a refusal to accept a message or for an insistence upon the payment of discriminatory rates. * * * Upon the acceptance of the message the defendant's duty was to deliver it in accordance with the contract, and the damages recoverable for nonperformance of the contract are the damages recoverable for nonperformance of the duty."

[41] As a matter of fact plaintiffs tendered the $150.00 to the respondents in July, 1938 (R. 79, 98-00), and since the trial refund has been made.

be reversed and the cause remanded with instructions to enter judgment for respondents for nominal damages only.

CONCLUSION.

For the reasons herein stated we respectfully submit that the judgment of the circuit court of appeals is erroneous and should be reversed and the cause remanded with instructions to enter judgment for the plaintiffs for nominal damages only.

Dated: San Francisco, California,
February 14, 1940.

Respectfully submitted,

FRANCIS R. STARK
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APPENDIX A

APPLICABLE PROVISIONS OF THE INTERSTATE COMMERCE ACT AND OF THE COMMUNICATIONS ACT OF 1934.

By the Act of June 18, 1910 (44 Stat. 539, 544, et seq.), the Interstate Commerce Act was amended to include telegraph companies. They remained subject to the Interstate Commerce Act, and to the jurisdiction of the Interstate Commerce Commission, until the enactment of the Communications Act of 1934 (48 Stat. 1064).

The provisions of the Interstate Commerce Act pertinent to the case at bar, as they read prior to the enactment of the Communications Act of 1934, are as follows (U.S.C. 49:1, et seq.):

"Section 1. (1) The provisions of this chapter shall apply to common carriers engaged in—

• • • • • • • •

(c) The transmission of intelligence by wire or wireless from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

• • • • • • • • •

(3) The term 'common carrier' as used in this chapter shall include • • • telegraph, telephone, and cable companies operating by wire or wireless; • • •.

• • • • • • • • •

(5) All charges made for any service rendered or to be rendered in the transportation of passengers

or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by wire or wireless subject to the provisions of this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: * * *.

* * * * * * *

Section 15. (1) Whenever, after full hearing, * * * the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier * * * for the transmission of messages * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, * * *."

The provisions of the Communications Act of 1934, pertinent to the case at bar, are as follows (U. S. C. 47:151, et seq.):

"Section 151. For the purpose of regulating interstate and foreign commerce in communication by wire and radio * * * and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law

to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Section 152. (a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . .

. . . . . .

Section 201.

. . . . . .

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: . . .

. . . . . .

Section 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting

such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

* * * * * * *

Section 205.

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for inves-

tigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, and maximum and minimum, charge or charges to be thereafter observed and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * * * *

Section 602.

* * * * * * *

(b) The provisions of Chapter 1 of Title 49 [the Interstate Commerce Act], insofar as they relate to communication by wire or wireless, or to telegraph, telephone, or cable companies operating by wire or wireless, except the last proviso of section 1 (5) and the provisions of section 1 (7), are repealed.

* * * * * * *

Section 603.

* * * * * * *

(b) There are hereby transferred to the jurisdiction and control of the Commission * * * (2) all records under the jurisdiction of the Interstate Commerce Commission * * * relating to the duties, powers, and functions imposed upon and vested in the Commission by this Act.

* * * * * * *

Section 604. (a) All orders determinations, rules, regulations, permits, contracts, licenses, and privileges which have been issued, made, or granted by the Interstate Commerce Commission, • • • under any provision of law repealed or amended by this Act or in the exercise of duties, powers, or functions transferred to the Commission by this Act, and which are in effect at the time this section takes effect, shall continue in effect until modified, terminated, superseded, or repealed by the Commission or by operation of law."

APPENDIX B

Excerpts from record and briefs in proceedings before the Interstate Commerce Commission in first unrepeated message case, 44 I. C. C. 670, and second unrepeated message case, 61 I. C. C. 541 showing the construction placed on the valuation clause by the carrier, the Commission, and the public.

(1)

Excerpts from the Western Union's answer in the first unrepeated message case:

> "It is true that the respondent has initiated and established, as under the act to regulate commerce it is its right and duty to do, certain classifications of messages providing for limitations of liability, which are now and for some time past have been on file with this honorable Commission, and which, so far as material in the present proceeding, are two: the limitation of liability for unrepeated messages to the amount received for sending the same, and *the limitation of liability* in all cases, whether the messages are repeated or not, to fifty dollars, unless a higher valuation is expressed and a small additional sum paid to cover the increased risk.
>
> • • • • • • •
>
> In order to provide therefore for the cases in which the unrepeated message stipulation is of no avail, and to guard against possible liability for enormous damages, the respondent, some years before the passage of the Act of Congress approved June 18, 1910, namely, during the year 1909, established and promulgated, and has since filed with this Commission its classification of messages into those with reference to which no value is stated and those which are valued at more than fifty dollars. *Respondent says that this classification was modeled on the similar classifications which theretofore had generally been sustained in the case of bills of lading and express receipts,* and respondent respectfully submits *that what is reasonable in the case of express companies and other carriers of goods should with even*

better reason be sustained in the case of telegraph companies.

* * * * * * *

Entirely apart from the stipulations limiting respondent's liability for unrepeated messages and for messages not specially valued, the claim of the complainants in this case is entirely devoid of any legal merit."

(2)

Excerpts from Western Union's brief in first unrepeated message case:

"* * * in order to provide for the cases in which the unrepeated message stipulation is of no avail, and to guard against possible liability for enormous damages, the respondent, some time before the passage of the Act of Congress approved June 18, 1910, namely, during the year 1909, established and promulgated, and has since filed with the Commission, its classification of messages into those with reference to which no value is stated and those which are valued at more than fifty dollars; *which classification was modeled on the similar classifications which theretofore had generally been sustained in the case of bills of lading and express receipts.*

* * * * * * *

"* * * the limitation of fifty dollars is far in excess of the money loss which is likely to result from any possible default in connection with the handling of the *average* message, or with the handling of more than twenty-five per cent. of all telegraph messages."

(3)

Excerpts from oral argument of counsel for Western Union before the Interstate Commerce Commission in the first unrepeated message case (Docket 8917, Dec. 10, 1920):

"The sender of a message can pay the ordinary unrepeated message rate under the agreement that there shall be no liability beyond the amount received for sending the message if it goes wrong, or he can pay one-half additional, to have the message re-

peated, and *he can recover for the actual loss*, not to exceed fifty times the amount paid for sending the message, *with a limitation that it shall not be more than $50*, and, finally, if he wishes full protection he can state what he thinks the message is worth and what he thinks his loss will be if it is not transmitted and delivered and he can secure absolute and full protection up to $1,000,000 or $2,000,000.

* * * * * *

Commissioner AITCHISON: Now, take the case of non-feasance, if the gentleman gave you a message and you failed to deliver it, what has repetition to do with it?

Mr. STARK: It has nothing to do with it. That is the very reason we need a valuation agreement for rate-making purposes * * *.

* * * * * *

If you do away with the classification of messages based on value, it would mean that in a large, a very large fraction of our messages, we would have no limitations at all."

(4)

Excerpts from the report of the commission in the first unrepeated message case, 44 I. C. C. 670, 672, 675, 676, 679:

"Then followed certain other provisions (set out in the footnote) which have always been interpreted by the defendant as limiting its liability for such an error in the transmission of an unrepeated message, as was made in this instance, to the nominal sum of *fifty dollars as a maximum* together with the return of the toll paid upon the message. That was its contention in the trial court as before stated and the same defense is made here. Apparently the claimants do not deny that this was the intended purpose and meaning of those provisions, or that the different charges for repeated and unrepeated messages with the restricted liability attached to them had long been in effect * * *

* * * * * *

The higher rate for repeated messages, concurrently maintained for many years with the unre-

peated rate, is predicated in part upon the additional service performed, and in part upon the liability of the defendant to make *good any damages incurred,* through error or delay in the transmission or delivery of the message, to the extent of fifty times the rate charged, *with a maximum of $50.* For a long time also the defendant has maintained still higher charges under which, upon the payment of one-tenth of 1 per cent of the amount of the assurance desired, the defendant, *within the value so placed upon the message,* assumes liability *to the full extent of the loss sustained.* The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay, while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves.

* * * * * * *

"In the case of a telegram, if the carrier is to assume the same degree of risk that is assumed by the express company under similar circumstances, the rate demanded is the repeated message rate, under which the liability of the carrier is *limited* to the sum of $50, unless a greater value is declared.

* * * * * * *

"Our conclusion upon the record is that the Congress, by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy but on the contrary are binding upon all until lawfully changed; and that

neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful."

(5)

Excerpt from tentative report prepared by the examiner in second unrepeated message case, 61 I. C. C. 541:

"Upon a review of the evidence, it is recommended that the Commission find that the present rates for the transmission of unrepeated interstate messages should be conditioned on a restriction of liability for errors, delays or other faults in the service to the *maximum sum* of $50, and for repeated messages to the *maximum sum of $150.*"

(6)

Excerpts from brief and argument filed in second unrepeated message case on behalf of the Joint Council of the National League of Commission Merchants for the United States, the International Apple Shippers' Association and the Western Fruit Jobbers' Association of America, interveners (page 5):

"The immediate problem before the Commission in this case as the Joint Council sees it is to *so revise the limitations of liability now in use* as to afford commercial users of telegrams in their daily business a right to hold telegraph companies responsible for the full result of mistakes and unreasonable delays, the failure to deliver messages sent at the normal commercial rates, and at the same time to protect the companies against unjust claims including fake claims and those of the mental anguish type."

(7)

Statement by Fayette B. Dow, Esq., attorney for the above-named interveners, made before the examiner in the same proceeding, quoted in their brief (page 11):

"It has had that effect, in a sense, because the Supreme Court has held, and made it the Federal

rule, at least, that the *contractual limitations of liability on the telegraph blanks are not void, but are reasonable in principle,* because they attempt to classify messages with respect to varying degrees of service for which different rates may be charged; and it is going to be our position in this case that the—what you might call—incidental application of the discrimination sections of the act to regulate commerce ought not to place a restriction upon the recovery for failure to deliver messages, for example, which did not exist at the time the amendment was passed in 1910."

(8)

Excerpt from brief filed in same proceeding on behalf of the National Industrial Traffic League (page 5):

"* * * the sum of $50 is wholly inadequate as a *maximum liability* * * *."

(9)

Excerpt from brief submitted by Clare J. Hall, Esq., on behalf of intervener Ernest L. Wellman, in the same proceeding (page 29):

"I cannot agree with the opinion of Examiner Pattison that the restriction of liability on unrepeated messages should be limited to a *maximum sum* of $50.00 and for repeated messages to the *maximum sum* of $150.00."

(10)

Excerpts from brief filed in same proceeding on behalf of the Board of Trade of Chicago and twenty-five other interveners (pages 26, 35):

"Such contracts for limitations are upheld because they are practical and reasonable as applied to freight, express matter and baggage.

* * * * * * *

"Hence this valuation theory, as applied to telegraph messages is not a reasonable limitation, because it is not a fair or practical one."

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 597

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, co-partners,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Supreme Court of the United States,

OCTOBER TERM, 1939.

No. 597

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,
Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, copartners,
Respondents.

REPLY BRIEF FOR PETITIONER

I

Certiorari was not improvidently awarded.

Both the lower courts plainly placed their decisions on the ground that the tariff provision should be construed as providing for liquidated damages, and these decisions have been given wide publicity. A refusal to grant certiorari would have resulted in a flood of unmeritorious litigation, and so it was a clear case for the granting of the writ. Besides, the judgment cannot be supported on the ground urged by respondents.

II

There was no finding of fact that the plaintiffs suffered any actual loss; and if there had been such a finding there was no evidence to sustain it.

The respondents rely here on the supposed finding of fact as to actual loss. There was however no such finding of fact. The finding was (R. 47) that the plaintiffs "have suffered and sustained damages, loss and injury, in the sum of $500", and the opinions of both the lower courts indicate that it was supposed to be justified only on the theory that they were entitled to liquidated damages. Liquidated damages are actual damages, in satisfaction for a legal injury, presumed conclusively to be compensation for a loss; which was all the finding of fact meant or was intended to mean. "Hence although we are unable to award to the plaintiffs the special damages they ask," said the district court, "they are entitled, under the facts alleged and proved, to the sum stipulated as liquidated damages in the contract" (R. 27).

But if treated as a finding of fact that there was an actual loss, of a character for which recovery could be had at law, as a result of the breach, there was no evidence to support it.

Respondents offer no explanation here of their failure to prove the date of the forfeiture, which was within their knowledge, but insist that it was proved that under Honduras law the shipment was not subject to confiscation until September fifth—two days after the money should have been paid.

But the plaintiffs closed their case without offering any evidence as to Honduras law. The defendant moved to dismiss on the ground, among others, that plaintiffs had failed to sustain the allegations in the complaint and that the damages alleged were not pleaded or proved to have been within the contemplation of the parties (R. 99); and this motion was denied (R. 100). The defendant then proceeded with its proof, and called as a witness the consul of the Republic of Honduras, introducing in evidence a translation

of "certain sections of the statutes" (R. 101) of that country. It is these sections of the Honduras statutes, introduced by the defendant, on which respondents now rely to sustain the judgment. No witness learned in the law of Honduras was called by either party. The consul testified that he was not a Honduras lawyer and was not familiar with any of the laws of Honduras pertaining to tariffs and duties outside of those contained in the volume produced (R. 100, 101). There was nothing to show that the sections received in evidence were *all* the relevant statutes, or that there were no rules or practices on the subject other than statutory ones. The translation was criticized by the court of appeals, and with some reason, as being obviously either erroneous or incomplete (R. 148), and that court properly pointed out that "under the circumstances, speculation is not a proper course of action" (R. 148). Speculation is the only support there is for the finding of fact if it means what respondents say. Not only can it not be determined definitely from the sections of the statutes in evidence on what date this particular shipment became subject to forfeiture, but there was nothing to show how long after it became subject to forfeiture law or custom demanded that the forfeiture should actually take place. That there was some discretion in the matter on the part of the authorities, and perhaps a period of grace or a privilege of redemption, seems evident from the fact referred to by respondents' counsel (brief, page 7) that Charles, the Honduras partner, as late as September 14, 1937, was still asking his agent at the port to "please intercede for us with the administrator of the customs."

Respondents contend that under Honduras law the shipment, arriving August fifteenth, was free of storage charges until August twenty-first, subject to such charges until September fifth, and after that subject to forfeiture (respondent's brief, pages 5 and 6). The storage charges were 36 lempira (R. 91), which is $18 (R. 92), per day; so by September third, the date of the breach, these charges alone, apart from duty, must have amounted to $216, or $66 more than the amount of the money order. Charles had to have

money from Nester to pay the amount due on the shipment even before there were accrued storage charges; without money from Nester he "could do nothing" (R. 91). It seems evident that the remittance even if it had promptly arrived would have been insufficient.

The burden was on the plaintiffs to show some direct connection between the breach and the loss; and this they wholly failed to do, although all the evidence on the subject was at their command.

III

The point that the actual loss was not within the contemplation of the company was duly raised below.

It was expressly raised in the motion to dismiss (R. 99).

In the "Concise statement of points on which the appellant intends to rely" in the court of appeals is included one to the effect that there is "no evidence that appellee suffered any damage" (R. 132) and another to the effect that the evidence "would not support a finding that they have been damaged in any sum" (R. 133); the reference clearly being to damage of a character for which the law would permit recovery in the absence of a valid limitation of liability.

It is true that because of the ground on which the district court had placed its decision the question as to the forfeiture of the goods being within the contemplation of the parties was not discussed in the court of appeals.

IV

As to the construction of the tariff.

Respondents make no serious attempt to sustain the construction adopted by the lower courts, and the only matters in their brief on this point which call for comment are as follows:

The *Neill case*, 57 Texas 283, decided in 1881, before the Interstate Commerce Act, involved a limitation of liability

to a nominal amount—ten times the amount received for sending the telegram, which was fifty cents. It made no difference there whether it was a limitation of liability or liquidated damages, the recovery having been for $1,750; and the point was not argued.

In the *Miazza case*, 50 Ga. App. 521, the court did not hold that all provisions for liquidated damages were in violation of the law of Georgia, but that agreements for fixed sums, "where the amount plainly has no reasonable relation to any probable actual damage which may follow a breach", will not be enforced as agreements for liquidated damages.

Counsel misinterprets footnote 22 on page 15 of our main brief. This was not an admission that the provision in question is ambiguous. It was on the contrary an explanation why the clause in the tariff was drawn in its present form; the explanation being that another and different form might possibly have been thought ambiguous.

Counsel comments on this court's recent decision in the *General American Tank Car case*, referred to on page 26 of our main brief, to the effect that this doctrine

> "applies only to administrative acts of the Commission; in the case at Bar the Commission had already passed on the tariff and it was part and parcel of petitioner's rates".

The point is that the Commission has never passed on the tariff if the tariff is to be construed as it was construed by the lower courts.

Dated: San Francisco, California,
February 28, 1940.

Respectfully submitted,

FRANCIS R. STARK
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Attorneys for Petitioner.

FILE COPY

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1939.

No. 597.

WESTERN UNION TELEGRAPH COMPANY, a corporation,

Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, co-partners,

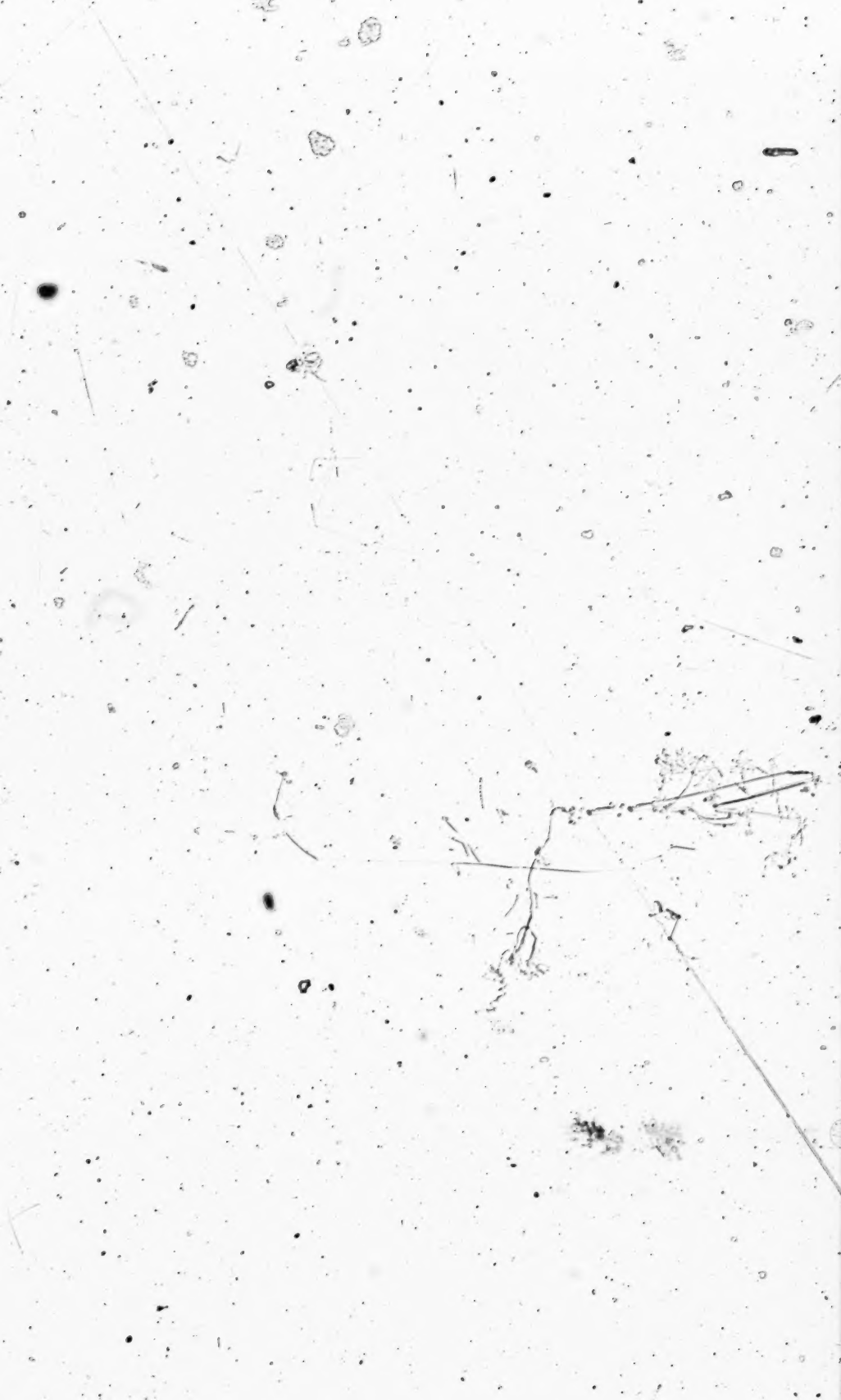
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS.

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IN THE

SUPREME COURT

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UNITED STATES.

OCTOBER TERM, 1939.
No. 597.

WESTERN UNION TELEGRAPH COMPANY, a corporation,
Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, co-partners,
Respondents.

BRIEF FOR RESPONDENTS.

Opinion Below.

The opinion of the Circuit Court of Appeals [R. 144] is reported at 106 F. (2d) 587. The District Court rendered two opinions [R. 21, 39], both of which are reported at 25 Fed. Supp. 478.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered September 15, 1939 [R. 159]. A timely petition for rehearing was denied November 27, 1939 [R. 159]. The petition for certiorari was filed December 18, 1939, and was granted January 29, 1940. The jurisdiction of this Court is invoked under section 240 (a) of Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

We agree with the statement of the case as set forth in petitioner's brief except that portion stating that the District Court held that respondents had failed to prove that they had suffered any damage by reason of the non-payment of the money; we also except to that portion wherein it is stated that the court directed the entry of judgment against petitioner on the ground that the provision in its money order tariff was a provision for liquidated damages. On the contrary, the court found that by reason of the failure of petitioner to deliver said money respondents suffered damages in the sum of five hundred dollars [Finding XII, R. 47], and this finding is amply supported by the evidence [R. 69, 83, 102-105, 121]. Moreover, as a conclusion of law from the facts found, the Court held that the condition on the back of petitioner's money order blank *limiting its liability*[1] to five hundred dollars is a valid undertaking. [Conclusions I, R. 47].

Summary of the Argument.

1. The writ of certiorari should be dismissed on the ground that it was improvidentially granted.

2. The finding of the trial court that respondents suffered damages in the sum of $500 is amply supported by the evidence, and is not based upon any theory of liquidated damages.

3. In any event, the theory set forth in the opinion (that the case was controlled by a provision for liquidated damages) is sound and would support the judgment.

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[1] All italics in this brief ours unless otherwise stated.

ARGUMENT.

1. The Writ of Certiorari Should Be Dismissed on the Ground That It Was Improvidentially Granted

Despite the findings of fact, conclusions of law and the judgment rendered thereon [R. 43-50], petitioner, nevertheless, earnestly contends, both in its petition for the writ and in its brief, that the question presented is: Does the limitation of liability provision in petitioner's money order tariff—which is substantially the same as that in its telegraph tariff—constitute a liquidated damage provision which would automatically make petitioner liable for damages in the fixed sum of $500, in case of default of service, regardless of whether or not the sender had sustained any actual damage, or is the provision rather one which fixes a maximum limit within which damages may be proved?

That such an inquiry, however, cannot be predicated on the record is, we think, manifest. The trial court found as a fact:

> "That it is not true that by reason of the failure of the defendant, Western Union Telegraph Company, to transmit and to deliver and to pay promptly said money order as aforesaid, the plaintiffs have suffered damages in the sum of seventy-six hundred ($7,600) dollars; *the court finds, however, that by reason of such failure, the plaintiffs have suffered and sustained damages, loss and injury in the sum of five hundred ($500) dollars*" [Finding XII, R. 47].

As a conclusion of law from the facts found, the court held that the condition on the application for the transmission of the money order filed by petitioner with the Federal Communications Commission *limiting its liabilities* to $500 is a valid undertaking [Conclusion I, R. 47].

Judgment for $500 was entered thereon [R. 50].

Since, therefore, the Trial Court made, signed, and filed said findings of fact and conclusions of law together with a judgment responsive thereto, we submit that the writ of certiorari should be dismissed on the ground that it was improvidentially granted.

2. The Finding of the Trial Court That Respondents Suffered Damages in the Sum of $500 Is Amply Supported by the Evidence.

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.

Rule 52 Federal Rules Civil Procedure.

As heretofore stated, the court found that by reason of the failure of petitioner to deliver said money respondents suffered damages in the sum of $500. Accordingly, the inquiry is whether the evidence will support the finding.

Among the items of special damage alleged in the bill of complaint was a shipment of goods reasonably worth $500 [Complaint XIV, R. 7]. The evidence shows that on or about August 2nd, 1937, respondent Nester shipped from Los Angeles to respondent Charles in Honduras, a shipment of gasoline and miscellaneous articles of the

value of $500 [R. 67-71, 80-83]; that this shipment arrived in Honduras on August 15, 1937 [R. 67, 81]; that Charles had no money to pay the charges on the shipment when it arrived [R. 91-92]; that the shipment was confiscated by the Hondurian government [R. 83]; Nester testified that because of the confiscation of the gasoline he and his partner were compelled to shut down the operation of the mill at the mine for three months [R. 82].

While it is true that the actual date of confiscation was not shown, yet it appears from the law of Honduras that the property was subject to confiscation 21 days after its arrival. Article 7 of petitioner's Exhibit C [R. 102] classifies merchandise which is entitled to *six days free deposit;* articles shipped by respondent [R. 69] come under this classification. Following article 7 further [R. 104], it states:

> "Two centavos shall be charged daily for Kilogram of merchandise after the fixed period of time has elapsed, to cover the expense of safe keeping the articles under the custody of the state shall not exceed *the period of six days* on the following goods: (The goods listed do not include those here involved) *And fifteen days on all others* (The goods listed include those here involved)."

It will be observed that all of the goods shipped by respondent come within the class of goods allowed *six days free deposit and fifteen days charge* [R. 69, 102-105]; so assuming that the goods arrived in Honduras on the 15th day of August, 1937, they were not subject to confiscation

until the 5th day of September, 1937, which was after Charles would have received the money, had it been promptly delivered by petitioner [R. 116].

Article 9 [R. 105] states:

> "The cargo referred to in Article 7th and 8th, shall be considered as of compulsory shipment, and its *custody* or reshipment *must* be applied for within the *time* and *conditions* established for deposits."

Article No. 41 [R. 105] reads:

> "The merchandise *shall become* the property of the state, and *will be sold* at public auction, whenever its *custody, deposit,* or *reshipment* are not requested as prescribed by law . . . ."

In the absence of contrary evidence we must presume that official duty was regularly performed, and that the above law was obeyed. (California Code Civil Procedure, Sections 1963 (15) and (33).)

The testimony of respondent Charles strongly supports this view. He testified that he was first notified of the arrival of the goods in Amapala, Honduras, by a letter "sent to me about four or five days after the arrival of the cargo and was received by me about four days after that date." [R. 90-91, 118.] He further testified: "If I remember rightly, the Government after the cargo gets in allows eight days. From that time on, they *charge* you two cents per kilo every 24 hours. In our case that would figure up to 36 Lempira every 24 hours" [R. 91-92].

Indeed, a further inference may be drawn from the evidence to the effect that the goods were not confiscated until a date subsequent to the 14th day of September, 1937,—a date when the money had not arrived as yet. Charles further testified: "On September 13, 1937, or thereabouts, I communicated with Mr. Nester (the Los Angeles partner) about this $150." [R. 83.] On further examination by the Court [R. 121], he stated: "I went down to Amapala about September 14, 1937. Up to that time, I did not go there at all. I wrote several letters asking our agent at Amapala if he would not please intercede for us with the Administrator of the Customs." It would appear from these two statements that the goods had not as yet been confiscated; otherwise, what good would intercession do if they already had been? Charles' subsequent statements [R. 121] as to the particular date of confiscation for the nonpayment of the charges may very well be taken to refer to some date beyond September 14th.

Manifestly, the foregoing evidence is at least susceptible of two inferences, both of which are equally cogent: First, that the goods were confiscated on the 5th day of September, 1937; and secondly, that confiscation might have taken place on or about the 14th day of September, 1937.

Despite the foregoing evidence and findings made by the trial court, petitioner nevertheless quotes freely from the memorandum opinions of the trial judge in order to impeach the actual findings so made and labelled.

This attack on the judgment is, in our opinion, untenable for two reasons. In the first place, the opinions of the trial judge cannot be resorted to for the purpose of controlling, modifying, or supplementing the findings otherwise disclosed by the record.[2] In the second place, the findings of the trial court [R. 47] were made and filed subsequent to the filing of the opinions; and such findings were specifically made after the request of petitioner "to add a new paragraph to the proposed Findings of Fact" stating that respondents *suffered no loss or damage* [R. 34, 43]. And even if as alleged that the judge made contrary "findings" in his opinions, still we submit he had a right to change his mind before signing and filing the "actual" findings which he so labeled and designated. It is these latter findings which constitute the judgment, and not anything that the judge might or might not have said in his memorandum opinions written prior thereto. See Rule 52, Rules of Civil Procedure.

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[2]See *Thompson, Starret v. Labelle Iron*, 17 Fed. (2d) 536; *U. S. v. Shingle*, 91 Fed. (2d) 85; *U. S. v. Sioux City Stockyards*, 167 Fed. 126.

Exceptions, perhaps, are admiralty cases and cases on the equity side of the docket where the decree rendered is not responsive to the findings and is so ambiguous as to necessitate a resort to the opinion to determine what actually was decided. See *Hall v. U. S.*, 267 Fed. 795; *Bankers Trust v. Henwood*, 88 Fed. (2d) 163; *National Laundry etc. v. Oconto Water Supply Co.*, 183 U. S. 216. It should be noted, however, that even in these cases, the opinions where used, were resorted to to support a judgment otherwise open to attack; not, as petitioner would here, resorting to an opinion to overthrow a judgment sufficient on its face when tested by the judgment roll.

3. The Theory Set Forth in the Opinion of the Trial Judge Holding That the Provision in Petitioner's Money Order Tariff Is a Provision for Liquidated Damages Is Sound and Would Support the Judgment.

Conceding arguendo that the opinion of the court could be resorted to for the purpose of impeaching the actual findings, still we contend that the theory set forth therein, namely, liquidated damages, is sound and supportable. The words used in petitioner's money order tariff are not an incantation which unfailingly invoke a provision for limitation of liability rather than a provision for liquidated damages.[3] Petitioner's tariff reads as follows:

> "In any event, the company shall not be liable for damages for delay, non-payment . . . . of this money order beyond the sum of five hundred dollars, *at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued* . . . ." [R. 57].

In *Wernick v. Western Union Telegraph*, 290 Ill. App. 569, at page 573, the court stated:

> *"Without the clause which the court (below) interpreted as liquidated damages provision*, the agreement is perfectly clear, and we do not perceive the

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[3] *Miazzi v. Western Union Telegraph Co.* (1934), 50 Ga. App. 521; *Wernick v. Western Union Tel. Co.* (1937), 290 Ill. App. 569; compare *W. U. Telegraph Co. v. Neil* (1882), 57 Texas 283, p. 289 *et seq.*, wherein the Court in construing the message provision held: "We fail to perceive on principle why in such cases the parties may not, as they did here, agree upon a sum certain in the nature of *liquidated damages*, for an error or delay arising from other cause than misconduct, fraud or want of care as above shown."

reason which prompted the telegraph company to insert the clause and thus obscure the otherwise perfectly plain intendment of the agreement."

Both courts below, likewise, interpreted the clause as a provision for liquidated damages, and the Circuit Court of Appeals in its opinion in the instant case stated that:

"When Nester delivered the $150 to appellant, he had a *right* to have the money transmitted, without unreasonable delay . . . Because of appellant's acts, that *right* was destroyed, and Nester is entitled to recover its *value*, which the parties agreed was $500."

And even petitioner, itself, admits that the provision is susceptible to such a construction and is ambiguous.[4]

Moreover, petitioner has, in our opinion, misapplied and misconstrued the decision of the court in *Miazza v. Western Union Tel. Co.*, 50 Ga. App. 521, 178 S. E. 764. In that case the court held that a provision for *liquidated damages* was in violation of the law of Georgia, and since petitioner was suing on a contract which was pleaded as such, the demurrer to the petition was good. The court did not undertake to construe the provision; it merely stated that provisions for *liquidated damages* were void in Georgia.

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[4]On page 15, footnote 22 of its brief, petitioner states in part: "There was some question when the money order tariff was adopted whether the valuation of a money order would be held invalid, since the money order—the piece of paper—can have no value, and it was thought that *some court* might insist that the only thing that was valuable was the *right* to have it paid, which had not been valued. * * *."

Not only is the construction of liquidated damages placed upon the provision sound from the point of view of the language used therein, but it can be argued, and with some force, we think, that such a construction reflects the true intention of the parties, disregarding for the moment the fact that the "other party" to the said contract had nothing to do with its framing. Petitioner's tariff makes provision for a valuation of $500 *unless* a higher value is stated. Might not a sender very well think that he had made a bargain—to be sure, not one of his own making, for he either had to take it or leave it—for the correct transmittal of his money or the payment to him of $500 for the *right* in case of default?

In the light of the foregoing, petitioner's arguments about fundamental rules of construction are not persuasive; and especially not so in view of the language used in the provision *which is of its own making.* Rather, it is our opinion, that a party who creates an ambiguity in a contract, particularly when the so-called "other party" to the contract is no way responsible therefor, should not be heard to complain that his ambiguity resulted in a construction contrary to that which he says he meant. The contract should be construed most strongly against the petitioner.[5]

The argument of petitioner on page 26 of its brief with reference to staying the enforcement of the provision until

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[5]*Weil v. California Bank*, 219 Cal. 538; *Bachman v. Independence Co.*, 214 Cal. 529; *Golden West Ins. v. Peardon*, 138 Cal. App. 481.

its validity had been passed upon by the Federal Communications Commission is inapplicable here for the reason that the cited case of *General American Tank, etc. v. El Dorado Terminal* applies only to administrative acts of the Commission; in the case at bar the Commission had already passed on the tariff and it was part and parcel of petitioner's rates.

We will not reply to the latter portion of petitioner's brief starting with the first paragraph on page 28, for the reason that such a point was not raised on appeal to the Circuit Court and by the very well known rules should not be reviewed here.

Conclusion.

For the reasons herein stated, it is our opinion that this court should dismiss the writ or affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California. February 21, 1940.

Respectfully submitted,

EARL C. DEMOSS,
AUGUST J. O'CONNOR,
GEORGE J. HIDER,
Attorneys for Respondents.

P 5.

SUPREME COURT OF THE UNITED STATES.

No. 597.—October Term, 1939.

The Western Union Telegraph Company, Petitioner, *vs.* Paul Nester and Juan Charles, Co-partners.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 22, 1940.]

Mr. Justice McReynolds delivered the opinion of the Court.

Respondents, Nester and Charles, are partners in mining operations near Aramecina, Republic of Honduras. September 1, 1937, at Los Angeles, California, petitioner, the Telegraph Company, in the ordinary course of business, received from Nester one hundred and fifty dollars for transmission by unrepeated message and delivery to Charles at Aramecina. It failed so to do.

In a "Complaint for damages for breach of duty" filed against petitioner in the District Court, Southern District, California, respondents claimed the failure to deliver resulted from gross negligence and that as a direct consequence they suffered specified losses amounting to $7,600. For that sum they asked judgment.

Petitioner denied liability and as an affirmative defense alleged—

"The money order referred to in the plaintiff's complaint was delivered to and accepted by the defendants subject to the terms of the standard money order contract of The Western Union Telegraph Company, a copy of which is hereto annexed."

It is not now denied that this standard form had been duly filed with the Federal Communications Commission and was treated by the parties as a statement of the contract between them. Certain of the conditions contained therein are printed below.[1]

The point for determination here arises out of the following condition—

"In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether

[1] Money Orders Are Subject to the Following Conditions:

Domestic orders will be canceled and refund made to the sender if payment cannot be effected within 72 hours after receipt at paying office (Ellis Island,

by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

The cause was tried by the court without a jury upon the pleadings and evidence. It found as matter of fact

"That it is not true that by reason of the failure of the defendant, Western Union Telegraph Company, to transmit and to deliver and to pay promptly said money order as aforesaid, the plaintiffs have suffered damages in the sum of Seventy-six hundred ($7,600.00)

N. Y., excepted). Orders payable at Ellis Island will be canceled after the expiration of five days.

In the case of a Foreign Order the Foreign equivalent of the sum named in the order will be paid at the rate of exchange established by the Company or its agents on the date of the transfer.

In the case of a Foreign Order the equivalent, in the currency of the country of payment, of the sum named will be purchased promptly; and if for any reason payment cannot be effected, refund will be made by the Company and will be accepted by the depositor on the basis of the market value of such foreign currency in American funds, at New York, on the date when notice of cancelation is received there by the Company from abroad.

When the Company has no office at destination authorized to pay money, it shall not be liable for any default beyond its own lines, but shall be the agent of the sender, without liability, and without further notice, to contract on the sender's behalf with any other telegraph or cable line, bank or other medium, for the further transmission and final payment of this order.

In any event, the company shall not be liable for damages for delay, nonpayment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

In the event that the company accepts a check, draft or other negotiable instrument tendered in payment of a money order, its obligation to effect payment of the money order, shall be conditional and shall cease and determine in case such check, draft or other negotiable instrument shall for any reason become uncollectible, and in any event the sender of this money order hereby agrees to hold the telegraph company harmless from any loss or damage incurred by reason or on account of its having so accepted any check, draft or negotiable instrument tendered in payment of this order.

All messages included in money orders are subject to the following terms—

The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the unrepeated message rate beyond the sum of five hundrd dollars; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the repeated message rate beyond the sum of five thousand dollars, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

Dollars; the court finds, however, that by reason of such failure, the plaintiffs have suffered and sustained damages, loss and injury in the sum of Five Hundred ($500.00) Dollars."

Evidently it was not intended by this finding to declare actual damages had been shown, as respondents' counsel suggest. After pointing out the lack of any evidence of actual loss resulting from the alleged negligence, the court's opinion asserts—"So that, assuming that the action is in tort, there is no substantial proof of any of the special damages claimed. However, the plaintiffs are not without redress."

The court found as matter of law "That the condition on the application for the transmission of the money order filed by The Western Union Telegraph Company with the Federal Communications Commission limiting its liabilities to five hundred ($500) dollars is a valid undertaking. That Paul Nester and Juan Charles, co-partners plaintiff are entitled to recover the amount of five hundred dollars ($500.00) against the Western Union Telegraph Company . . . without prejudice to their right to sue for and recover the one hundred and fifty ($150) dollars" accepted for transmission.

The condition relative to liability for $500.00, quoted above, was construed by the trial court as "a provision for liquidated damages, which entitled the sender to recovery of the minimum amount of five hundred dollars in the absence of any proof or without any offer of proof." And it said, "Hence although we are unable to award to the plaintiffs the special damages they ask, they are entitled, under the facts alleged and proved, to the sum stipulated as liquidated damages in the contract. . . . Here the plaintiffs, under the facts alleged in the complaint and proved at the trial, have shown themselves entitled to recovery, even though they were unable to prove the damages they sought."

The judgment against petitioner was affirmed by the Circuit Court of Appeals. The opinion there declares—

"Appellant contends that the provision in the money order blank was a part of the tariff filed with the Interstate Commerce Commission, and as such limited the damages recoverable to the actual damage, not exceeding $500, and that without actual damage there could be no recovery. The question presented is one of interpretation of the provision, not of validity thereof."

Also—"Here, the provision in question has a limitation of liability clause—'the company shall not be liable for damages . . . beyond the sum of five hundred dollars'. The provision also con-

tained a clause by which it was agreed that 'the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued' at $500. Although appellant contends that the clause means that such right is valued at not 'beyond the sum of' $500, the clause does not so state. It states that such right is valued at $500."

"When Nester delivered the $150 to appellant, he had the right to have the money transmitted without unreasonable delay (Western U. Teleg. Co. *v.* Crovo, 220 U. S. 354) and delivered to Charles. Moore *v.* New York Cotton Exchange, 270 U. S. 593. Because of appellant's acts, that right was destroyed, and Nester is entitled to recover its value, which the parties agreed was $500."

By its petition for certiorari the Telegraph Company presents a single question—"Does the limitation of liability provision in petitioner's money order tariff—which is substantially the same as that in its telegraph tariff—constitute a liquidated damage provision which would automatically make petitioner liable for damages in the fixed sum of $500, in case of default in service, regardless of whether or not the sender had sustained any actual damage, or is the provision rather one which fixes a maximum limit within which damages may be proved?"

We think the provision in question was not intended to prescribe a definite liability (liquidated damages), but is a limitation upon the maximum permissible recovery for actual loss or damage properly alleged and shown by evidence. The courts below erred in ruling otherwise.

Considering what has been ruled in *Western Union Telegraph Co.* v. *Esteve Bros. & Co.* (1921), 256 U. S. 566; *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281; *Western Union Telegraph Co.* v. *Priester* (1928), 276 U. S. 252, the validity of the condition before us is not open to serious doubt; and viewed in the light of its history and evident purpose it must be interpreted as imposing a limitation upon the amount which may be recovered. See, *Unrepeated Message Case*, 44 I. C. C. 670, 675, and *Limitations of Liability in Transmitting Telegrams*, 61 I. C. C. 541, 550.

The interpretation of the condition approved below would permit a recovery of five hundred dollars irrespective of the sum deposited for transmission and without requiring the sender to show any loss whatsoever. A mere failure to transmit a small sum deposited with the company might impose a heavy and utterly unreasonable burden upon the common carrier although the patron had suffered no loss.

This does not harmonize with the declared purpose of the statute to impose just and reasonable rates.

The precise question here involved has been ruled upon by two intermediate courts. *Miazza* v. *Western Union Telegraph Co.* (1935), 50 Ga. App. 521; and *Wernick* v. *Western Union Telegraph Co.* (1937), 290 Ill. App. 569, 573-574. In the first the Supreme Court of Georgia sustained a demurrer to a complaint which definitely sought to recover five hundred dollars as liquidated damages for failure properly to transmit a message. The opinion in the second cause well said—

"Although this particular clause has been a part of the rules, regulations, classifications and tariffs of the telegraph company since 1921, it has never been interpreted as a liquidated damage provision, and no cases are cited which would justify such an interpretation. Reading the agreement as a whole, as it must be read under the fundamental rules of construction, and taking into consideration the historical reasons for changing the legal relationship between telegraph companies and their patrons through federal legislation, and the effect thereof as stated by the court in *Western Union Telegraph Co.* v. *Esteve Bros. & Co.* and the *Priester* case, *supra*, we think the court was unwarranted in interpreting the language employed as a liquidated damage clause. In so doing, it evidently failed to consider the intent, purpose and meaning of the entire clause, and considered only the words 'at which amount the right . . . is hereby valued.' The fair interpretation of the provision as a whole must necessarily give effect to the plainly expressed clauses which precede and follow the so-called liquidated damage provision, stating that '*in any event, the company shall not be liable for damages* for delay, nonpayment or underpayment of this money order, whether by reason of negligence on the part of its agents, servants, or otherwise, *beyond the sum of* $500 . . . , unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid, based on such value, equal to one-tenth of 1 per cent thereof.' The provision, when read in its entirety, was clearly intended to fix, not a definite liability, but a maximum liability or agreed valuation upon which the rate to be paid for the shipment or carriage is to be collected."

The challenged judgment must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion.

Reversed.